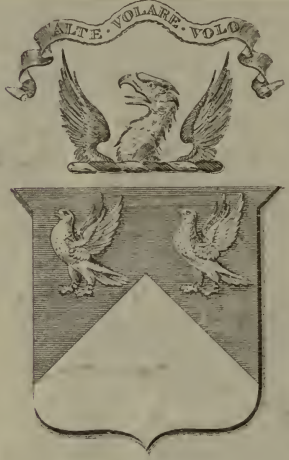
LEADING CASES IN CONSTITUTIONAL LAW

Second Edition

THOMAS



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LEADING CASES

IN

CONSTITUTIONAL LAW.

LEADING CASES

IN

CONSTITUTIONAL LAW

BRIEFLY STATED.

WITH INTRODUCTION AND NOTES.

BY

ERNEST C. THOMAS, Esq.,

LATE SCHOLAR OF TRINITY COLLEGE, OXFORD, AND BACON SCHOLAR
OF THE HON. SOCIETY OF GRAY'S INN.

JUDICIA ENIM ANCORAE LEGUM SUNT UT LEGES REIPUBLICAE.

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PREFACE

TO THE SECOND EDITION.

I NEED only say by way of introduction to the present edition, that the demand for this little book during the time it has been out of print has been such as to convince me, that it has been found useful to those for whose use it was originally published, and is now again committed to the press.

A sufficient explanation of the design of this work will be found in the following paragraphs, which I repeat here from the Preface to the First Edition.

"Some knowledge of the chief cases in Constitutional Law is now required in many examinations, and is obviously necessary to the thorough student of our constitutional history. Yet there has existed no book briefly setting out the main principles decided in these cases, which are scattered through many volumes, and buried in prolix reports. Even Dr. Broom's book, although, in spite of its thousand

pages, it is the nearest approach to anything of the kind, lacks the brevity and conciseness which are so necessary for the student.

"What I have endeavoured to do is to extract the essence of the cases with which the student is expected to be familiar, preserving always something of the concrete circumstance that is so helpful to the memory; to add, where necessary, a short note to the individual case; and to subjoin to each important group of cases some general remarks in the shape of a Note. The cases are so arranged as to be convenient for ready reference, and while the treatment is very concise, I hope that it is sufficiently accurate."

The technical way in which legal arguments are conducted in Court, and the fact that students usually take up the study of Constitutional History and Law before they have learnt how to find their way among the innumerable volumes of the reports, make a convenient guide to them the more necessary. But it need hardly be added that the student should by no means neglect to examine for himself the reports "at large."

E. C. T.

3, Harcourt Buildings, Temple,
January, 1885.

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OTHER ABBREVIATIONS ARE:

L. C. J., Lord Chief Justice of the King's, or Queen's, Bench.
C. J., Chief Justice of the Common Pleas.
L. J., Lord Justice of Appeal.
J., Mr. Justice.
C. B., Lord Chief Baron.
B., Mr. Baron.
H. L., House of Lords.
P. C., Privy Council.
Sc. Cam., or S. C. (Scaccarii Camera), Exchequer Chamber.
Q. B., Queen's Bench.
C. P., Common Pleas.
Ch. Div., Chancery Division; Ex., Exchequer; Ex. Div., Exchequer Division; Ch. D., Chancery Division; Q. B. D., Queen's Bench Division.
A.-G., Attorney-General.
S.-G., Solicitor-General.

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SUMMARIZED OR CITED.

*** *The principal Cases are printed in Italics.*

LEADING CASES

IN

CONSTITUTIONAL LAW.

INTRODUCTION.

Constitutional Law—where to be found.

WHERE there exists a body of laws regulating the distribution and exercise of the supreme power in a community, and a Court entrusted with its interpretation, the term Constitutional Law has a very definite application. That is the case, for example, in the United States. In England, on the other hand, where there is no written constitution, this law exists in a much looser shape, and can only be collected from legal decisions, parliamentary precedents, and actual practice.

Importance of judicial decisions.

We are here concerned with constitutional usage only in so far as it has been established or illustrated by the decisions of the law-courts. Although these are far from covering the whole extent of constitutional practice, we shall see that many of the most important principles of the Constitution have come under the discussion and determination of the Courts. That part of our constitutional law should have been made by the judges, will not surprise anyone who knows how enormous has been their influence in the whole field of English law.[1]

Constitutional Law—its extent.

For practical purposes we must take the term 'Con-

[1] "The whole of the rules of Equity and nine-tenths of the rules of Common Law have in fact been made by the judges."—*Mellish*, L. J., in *Allen* v. *Jackson*, L.R. 1 Ch. Div. 405.

stitutional Law' to include not only what Austin calls 'constitutional law proper,' but also what he calls 'administrative law,' the two branches making up together 'the law of political conditions, or public law.'[1] Constitutional law proper, in his view, only 'fixes the constitution or structure of the given supreme government.' Administrative law determines the mode in which the sovereign power is to be exercised, either by the sovereign power itself, or by the subordinate political officers to whom portions of the sovereign power may be delegated.

Its object—the prevention and remedy of misgovernment.

Or we may put it in another way perhaps, and say that Constitutional Law has for it object security against misrule, and remedy in the event of misrule. And we shall for the present be chiefly concerned with this latter aspect of constitutional law. We shall consider a particular class of injuries and delinquencies arising from the misuse of the power bestowed upon rulers and administrators, and the remedies provided for them by the tribunals of the country.

Its relation to Common Law misrepresented.

An attempt has been made in one of the few works upon this subject to elaborate a contrast between Constitutional Law and Common Law, and to 'illustrate the relation between them.'[2] Constitutional law is there said to mean 'the aggregate of doctrines and sanctions directly tending to the maintenance of our social union;' and common law, 'the aggregate of rules and maxims directly tending to the maintenance of private rights.' The antithesis here attempted does not really exist; there is no such line of demarcation between constitutional law and common law. They are not disparate and independent branches of law. Constitutional law is simply a portion of the common law, and is included in it as the part is included in the whole. The distinction is not only useless and untrue—it is even dangerous. It

[1] 1 Austin, Jurispr. 4th ed. pp. 73, 274.
[2] Broom, Const. L. pp. vii., viii.

is precisely this notion that the constitutional law was above and beside the common law, that has caused some of the chief difficulties of our constitutional history. It explains not only the exaggerated claims of the Stuart monarchy, with its pretence of a divine authority not subject to the laws, but it also explains the comparatively recent attempt on the part of the House of Commons to assert what has been called 'a supremacy not short of the divine right of Charles or of James.'[1] What may be said is, that constitutional law is that part of common law which deals directly with the exercise of the functions of government, sometimes securing the subject against unfair abuses of original or delegated power; sometimes protecting the ministers of government in the proper execution of their duties.

The true relation.

The supreme power in this country is lodged in the people, but is exercised, as to the matter of form, through a parliament consisting of king, lords, and representatives of the commons. The main functions of government are twofold — the Legislative and the Executive.

The Constitutional Powers.

Of these, the former is carried out in the main by parliament itself, although certain minor powers of legislation are delegated to the crown in council, to subordinate officers, and even to certain private corporations. The Executive function, on the other hand, is exercised entirely by delegates, under the direction of the crown, itself in this respect the delegate of parliament. It may be divided into an Administrative and a Judicial department. The latter function is evidently, in theory at least, of a merely remedial nature. Supposing the laws to be always perfectly intelligible, and always perfectly obeyed, there would be no necessity for the interference

i. Legislative.

ii. Executive.

a. Administrative.

b. Judicative.

[1] Hearn, Government of England, p. 2.—Lord Camden reminds us, in his judgment in *Entick* v. *Carrington*, that "Serjeant Ashley was committed to the Tower in the 3rd of Charles I. by the House of Lords for only asserting in argument that there was a law of State different from the Common Law": 19 S. T. 1073.

of courts of justice. The judges are called in either to enforce obedience to the laws (more strictly, perhaps, to determine for the guidance of the Executive, whether the laws have been disobeyed); or to decide between contending parties, each, perhaps equally anxious to obey the laws when known, as to their proper interpretation.

Summary.

Briefly, then, we may say that the Legislative function is the supreme power of making laws: the Administrative function is the supreme power of executing them: and the Judicative (or Judicial) function is the supreme power of interpreting them when called upon.

We may now proceed to look in cases and judicial decisions for illustrations and proofs of the constitutional limitations of these several branches of the supreme power, taking them in the order here laid down.

'Leading cases.'

One caution must be borne in mind as to the use of the term 'Leading Cases.' The ordinary use of the expression indicates a case that settles the law upon some important question.[1] But it will be observed, with regard to these constitutional cases, that in some instances the decisions of the judges were wrong, whether through error of judgment or from servility. In some instances the legislature has interfered, and has settled the law, usually by statute; or in others the better opinion has tacitly reasserted itself. Yet these cases may be fairly called 'leading,' as being of the greatest importance in the history of the constitution. Although they cannot themselves be directly cited for the purpose, yet the whole proceedings connected with them do, in the result, establish the law on the principle involved. And the peculiar importance of constitutional law, and its intimate connexion with our national life and political development, lend a special interest and value to the record of each step in those proceedings.

[1] "Each case involves, and is usually cited to establish, some point or principle of real practical importance."—1 Smith, L. C. p. ii.

I. The Legislative Function.

i. *The Crown.*

The legislative function properly belongs to the crown in parliament, and no single branch may legislate without the concurrence of the other two. The Executive has a limited power of legislation by orders in council, &c., but only when such power has been expressly delegated by parliament.

Speaking generally, and leaving out of view such special emergencies as the Civil War or the Revolution, the only conscious attempt at independent legislation has been made by the highest branch of the legislature—the crown.

The crown has attempted to exercise a power of independent legislation in virtue of an asserted prerogative by licence and dispensation or by proclamation and ordinance: *Case of Monopolies; Case of Proclamations.* It has also claimed the right of suspending and dispensing with laws passed by parliament. *Thomas* v. *Sorrell*, and *Godden* v. *Sir Edward Hales*, were cases of particular dispensations; while the *Case of the Seven Bishops* illustrates the attempt to suspend certain penal statutes by royal proclamation. The power of taxation is constitutionally a department of the legislative power. Attempts on the part of the crown to usurp it, as seen in *Bate's case* (*the Case of Impositions*); where the King imposed a customs duty without consent of parliament; and *Rex* v. *Hampden* (*the Case of Ship Money*), where writs were issued for the collection of money without parliamentary authority.

In many of these cases the decision of the law courts was for the crown; and the true principle that the crown may not legislate nor impose, save with the consent of parliament, was not established without violent struggles.

ii. *Parliament.*

Some of the cases noticed under this heading illustrate unconstitutional attempts by the House of Commons to usurp a legislative power in establishing rules of privilege which have led to collisions with the courts of law and with the House of Lords.

It was admitted that the House of Commons has a right to determine all matters touching the election of its own members. But the attempt to enlarge this privilege and to determine the rights of electors led, in the case of *Barnardiston* v. *Soame*, to a conflict between the House of Commons on the one side and the law courts, together with the House of Lords, on the other. The legal question in dispute was ultimately settled by statute.

Again, in the case of *Ashby* v. *White*, the House of Commons renewed its pretensions and maintained their claims so obstinately that they committed the persons who had brought actions, together with their legal advisers, as for contempt, and even summoned the judges before them to explain their conduct. These steps led to a further collision with the House of Lords, which was only put an end to by the prorogation of parliament. After which, however, the law courts had their way.

Again, in the case of *Stockdale* v. *Hansard*, a limit was set to the privilege of parliament, and it was decided that it may not authorise libellous matter to be published. Another statute was passed to provide for this difficulty. But the case is decisive of the right of the law courts to inquire into matters of parliamentary privilege.

The undoubted privileges of the two Houses, however, are very great. A member of either House is not to be called to account elsewhere for anything said or done by him in parliament; *Lord Shaftesbury's case; Rex* v.

Eliot, Hollis and Valentine; though the privilege has been held not to protect a member for what he does out of doors: *Rex* v. *Lord Abingdon; Rex* v. *Creevey.*

Either House may commit for breach of its privileges: *Burdett* v. *Abbot.* Nor will a court of law inquire into the ground of such commitment: *Sheriff of Middlesex' case; Howard* v. *Gosset.* Nor will a court of law interfere with the entire control of the House over its own proceedings: *Bradlaugh* v. *Erskine; Bradlaugh* v. *Gosset.*

II. The Executive Function.

The Crown.

The crown is the head of the executive power, and as such is entitled to allegiance, the nature and limitations of which are considered in *Calvin's case.* The crown is also invested with certain high prerogatives, though they are of course subject to the law of the land.

With regard, indeed, to Colonies and Dependencies obtained by conquest, as opposed to those acquired by occupancy or settlement, the crown (subject to the paramount authority of parliament) possesses the whole authority of legislation. It is limited, however, by this restriction, that when it has once granted a legislature to such a colony it cannot afterwards exercise there any legislative power: *Campbell* v. *Hall.*

That the King can do no wrong is one of the maxims of the Constitution oftenest employed and most misunderstood. Though an action will not lie against the crown as it will against a private person, yet the subject is not without a remedy, if his rights are illegally invaded by the crown. His proper course is to proceed by Petition of Right, which he may now by statute bring in any of the superior courts in which an action might

have been brought, if it had been a question between subject and subject. This mode of procedure is illustrated by the *Bankers' case ;* while *Viscount Canterbury* v. *The Attorney-General* shows that it cannot be adopted to recover compensation from the crown for damage due to the negligence of the servants of the crown. Nor can it be maintained against the crown to recover damages for a tort : *Tobin* v. *The Queen.* As the crown may not be sued directly, so its revenues may not be reached indirectly by an action against its servants : *Queen* v. *The Lords Commissioners of the Treasury.*

i. *Administrative.*

The officers of State are, as a consequence of their official position, protected by certain immunities ; while, on the other hand, the subject is protected against their misuse of the powers entrusted to them for public purposes.

To begin with the latter case, there is first and most important, as a guarantee of the liberty of the subject, the Habeas Corpus Act, the operation of which is here illustrated by *Darnel's case.* In connexion with this subject there are also given the cases of *Shanley* v. *Harvey ; Sommersett's case ; The Slave Grace ; The Le Louis ;* and *Forbes* v. *Cochrane,* to exhibit the attitude of the English law towards slavery ; and *Pigg* v. *Caley,* as the last case in which villeinage was alleged in a court of law. Finally, *Rex* v. *Broadfoot* illustrates a singular, though now obsolete, exception to the respect paid by our law to the personal right, and freedom of Englishmen in the right of Impressment.

Another valuable guarantee of the rights of the subject against the executive consists in the doctrine of the illegality of general warrants, here illustrated by *Leach* v. *Money ; Wilkes* v. *Wood ;* and *Entick* v. *Carrington.* In each of these latter cases the plaintiff

recovered damages against the agent of the executive for an illegal use of power. While the Constitution thus protects the subject against the officers of the executive, it affords certain immunities to public officers. They are not answerable for the negligence or default of their subordinates: *Lane* v. *Cotton.* They are not held personally liable for contracts made by them on behalf of the public in the performance of their duties: *Macbeath* v. *Haldimand;* nor are they liable to be sued in respect of acts done in the performance of their public duties: *Gidley* v. *Lord Palmerston;* or for breach of other than statutory duties: *Grant* v. *Secretary of State for India.*

Governors of colonies are not viceroys, and their powers are limited by the express terms of their commission. They may be sued therefore either in their own courts or in the English courts: *Fabrigas* v. *Mostyn; Cameron* v. *Kyte; Hill* v. *Bigge; Phillips* v. *Eyre.* They will not be held responsible, however, for an act of State within their authority, though the Court will decide what is an act of State: *Musgrave* v. *Pulido.*

A viceroy, having a fuller delegation of royal authority, cannot be sued in his own courts for an act of State: *Tandy* v. *Lord Westmoreland; Luby* v. *Lord Wodehouse; Sullivan* v. *Earl Spencer.*

It is an important constitutional principle that only soldiers are subject to military law: *Grant* v. *Gould.* As to the relations between officers in the military and naval services, and their liability to their subordinates, they are governed by the principle that those who have voluntarily entered these services are bound by its regulations. The Courts will, generally speaking, decline to discuss essentially military or naval matters. No remedy is obtainable in a civil court for damage, even maliciously caused to his subordinates by a superior officer acting within the scope of his duties: *Sutton* v. *Johnstone; Dawkins* v. *Lord Rokeby.* Nor are officers liable to outsiders for any injury done by them while

acting in discharge of their duties: *Buron* v. *Denman.* But they are liable for tortious acts done without authority: *Madrazo* v. *Willes.*

ii. *Judicative.*

The integrity and independence of our judicial system is secured in various ways. The sovereign, although he is the fountain of justice, and the judges are regarded as his delegates, cannot institute a new court of justice with a new jurisdiction, nor can he personally determine causes: *The Case of Prohibitions.* No jury is liable to be fined or otherwise punished for its finding: *Floyd* v. *Barker; Bushell's case.* The judges are made independent of the crown by being removable only on an address of both houses of parliament. They are made independent of the people by not being civilly liable for any judicial act: *Hamond* v. *Howell; Houlden* v. *Smith; Kemp* v. *Neville; Fray* v. *Blackburn.* This extends even to a judge acting without jurisdiction, unless he knew, or ought to have known, that he had no jurisdiction: *Calder* v. *Halket.*

The same immunity is afforded to the parties, and their advocates, and to the witnessess in all legal proceedings: *Astley* v. *Younge; Munster* v. *Lamb; Seaman* v. *Netherclift.*

Finally, a group of cases is presented illustrating that liberty of the press which is one of the strongest guarantees of constitutional rights. *Wason* v. *Walter* shows that parliamentary proceedings may be fully reported; *Curry* v. *Walter* and *Usill* v. *Hales* show that this freedom covers also the reports of proceedings in courts of justice. It has been held, however, not to extend to the proceedings of public meetings: *Davison* v. *Duncan;* though now, by a recent statute, protection has been secured to newspapers in this respect also.[1]

[1] Newspaper Libel and Registration Act, 1881 (44 Vict. c. 60).

LEADING CASES.

The Case of Monopolies. 44 *Eliz.* 1602. 11 *Rep.* 85.

This was an action by Darcy, a groom of the privy chamber to Queen Elizabeth, against Allein, a haberdasher, for making playing-cards, for the exclusive importing and making of which Darcy held a patent from the queen.

Two questions were argued at the bar: (1) Was the grant of sole making good? (2) Was the dispensation from the stat. 3. Edw. 4, c. 4, which imposed a penalty on importing cards, good?

It was argued for the defendant, and

Held by *Popham*, L. C. J., and the Court, that: (1) The grant was a monopoly, and therefore void as against both common law and statutes, and also as against public policy; (2) The dispensation was also against law. The king may dispense with particular persons, but may not dispense for a private gain with an Act passed *pro bono publico*.

Judgment for the defendant.

Note.—Coke adds that 'our lord the king that now is,' in his 'Declaration,' printed in 1610, has published that 'monopolies are things against the laws of this realm.' In 1623 a statute was passed declaratory of the law, which, however, reserved the rights of corporations and of 'any companies or societies of merchants' (21 Ja. 1, c. 3, s. 9), and continued for many years the subject of controversy.

In 1683–5 the question was fully discussed in the 'Great Case of Monopolies,' or the *East India Co.* v. *Sandys*, when the grant of sole trading to the company was held good by the

judges. The very elaborate judgment of *Jeffreys*, L. C. J., was separately printed in 1689, and is spoken of by Macaulay as 'able, if not conclusive.' In 1694 the company[1] obtained a further charter, upon which a resolution was carried by the House of Commons 'that all subjects of England have equal right to trade to the East Indies unless prohibited by Act of Parliament,'[2] and this has ever since been considered to be the sound doctrine.

The statute of James, of course, expressly provides that no declaration therein contained shall extend to any letters-patent, and grants of privilege to inventors for the term of fourteen years or under. In consequence of statutes of the last and present reign, this term may now be extended by the Sovereign in Council for seven[3] or even fourteen years.[4]

It was decided in the case of *Feather* v. *The Queen*, in 1865,[5] that letters patent do not preclude the crown from the use of the invention protected by the patent, even without the assent of or compensation made to the patentee.

[1] 10 S. T. 371; Skinner, 132, 223.
[2] 5 Parl. Hist. 828.
[3] 5 & 6 Will. 4, c. 83.
[4] 7 & 8 Vict. c. 69.
[5] 6 B. & S. 257.

The Case of Proclamations. 8 *Ja. I.*, 1610.

12 *Rep.* 74; 2 *S. T.* 723.

History. This arose out of the Petition of Grievances. On the 20th Sept. 1610, *Coke*, as L. C. J., was called before the Privy Council; and it was referred to him whether the king, by proclamation, might prohibit new buildings in London, or the making of starch of wheat, which had been preferred to the king by the House of Commons as grievances and against law. *Coke* asked leave to consider with his colleagues, since the questions were of great importance, and they concerned the answer of the king to the Commons. It was afterwards

Answer. *Resolved* by the two Chief Justices, Chief Baron, and Baron Altham, upon conference betwixt the Privy Council and them, that the king hath no prerogative but that which the law of the land allows him. He cannot by his proclamation change any part of the common law, statute law, or customs of the realm; nor can he create any offence by his prohibition or proclamation, for that would be to alter the law. But he may by proclamation admonish his subjects to keep the laws; and subsequent disobedience is an aggravation of the offence.

Note.—On the subject of Proclamations, see a note by *Cockburn*, L. C. J., in his charge to the Grand Jury in *Reg.* v. *Nelson and Brand*, 1867, p. 37.—Comp. the resolution of the judges to the above effect in 2 P. & M. 1554, *Dalison*, p. 20, ca. 10, where it is said "divse presidents fueront monstre hors del Excheaker al contrary, mes les Justices naver regard a eux, quod nota."

Thomas *v.* **Sorrel.** 25 *Car. II.*, 1674.

Vaughan, 330—359.

The plaintiff claimed a large sum of money from the defendant for selling wine on various occasions without a licence, contrary to stat. 12. Car. 2. The jury returned a special verdict, on the ground that they found a patent of 9 Ja. 1 incorporating the Vintners' Company, with leave to sell wine *non obstante* the stat. 7 Edw. 6.

The chief question to be argued was the validity of these letters patent; and to 'this dark learning of dispensations' *Vaughan*, C. J., applies himself.

Judgment. *Malum per se* cannot be dispensed with; and as to *mala prohibita*, those statutes only may be dispensed with which were made for the king's profit, but not where they are for the general good, or the good of a third party. He may dispense with nuisances and penal laws by which no third party has a particular cause of action. Dispensations to individuals have been numerous; the indefiniteness of the persons is no argument against extending the dispensation to corporations.

Judgment, therefore, *quod querens nil capiat.*

Note.—The law as here laid down agrees with the view of Coke: 1 Inst. 120*a*, 3 Inst. 154, 186. Blackstone observes that 'The doctrine of *non obstantes* . . . . abdicated Westminster Hall when King James abdicated the kingdom;' (1 Comm. 342).

Godden *v.* **Hales.** *2 Ja. II.*, **1686.**

2 Shower, 475; 11 *S. T.* 1165.

This was a collusive action, brought to establish the dispensing power claimed by the crown The plaintiff sued Sir Edward Hales, who was lieutenant of the Tower, for neglecting to take the oaths of supremacy and allegiance, which he was bound to do as a military officer by the Test Act (25 Car. 2). He had been indicted and convicted at the Rochester assizes, and the present action was to recover the penalty of 500*l.* History.

The defendant pleaded a dispensation from the king by his letters patent under the great seal. Were this pardon and dispensation a good bar to the action? Plea.

Eleven judges out of twelve concurred in holding that they were.

It is a question of little difficulty. There is no law whatever but may be dispensed with by the supreme lawgiver; as the laws of God may be dispensed with by God Himself. The laws of England are the king's laws; it is his inseparable prerogative to dispense with penal laws, in particular cases and upon particular reasons; and of these reasons the king himself is sole judge. Judgment.

Decided:—That the king has a dispensing power.

Note.—The judgment of *Herbert*, L. C. J., proceeded upon the most extravagant ideas of prerogative. Nevertheless, it is by no means evident, in the words of Hallam, that this decision was against law.[1] The dissentient judge in this case was *Street*, and *Powell* is said to have doubted, which, judging from his doubts in the *Bishops' case*, is very probable.

[1] 3 Hallam, Const. Hist. Eng., 7th ed. 61–63.

Seven Bishops' Case. 4 *Ja. II.*, 1688.

12 *S. T.* 183; 3 *Mod.* 212; 2 *Phillips, S. T.* 259—355; *Br.* 408—523.

History. James II. had ordered by proclamation that a Declaration of Indulgence should be read by the bishops and clergy in their churches, and that the bishops should distribute the Declaration through their dioceses to be so read.

Six of the bishops met at the archbishop's palace at Lambeth and drew a petition that the king would not insist upon their distributing and reading the Declaration, 'especially because that Declaration is founded upon such a dispensing power, as hath been often declared illegal in parliament, and particularly in the years 1662 and 1672, and the beginning of your Majesty's reign.' This petition six of them presented to the king in person. Shortly afterwards they were summoned to appear before the council to answer 'matters of misdemeanour,' and were told that a criminal information for libel would be exhibited against them in the King's Bench, and were called upon to enter into their recognisances to appear. This they refused to do, insisting upon their privileges as peers; and were accordingly committed to the Tower.

Case for the crown. On the 29th June the case came on, when they were charged with a conspiracy to diminish the royal authority, and in prosecution of this conspiracy with the writing and publishing of a certain 'false, feigned, malicious, pernicious and seditious libel.'

After much time wasted in attempts to prove the handwritings of the bishops, it was only done by calling Blathwayt, a clerk of the Privy Council, who had heard the bishops own their signatures to the king.

But the libel was charged to have been written in

Middlesex, and this could not be proved—as it had in fact been written at Lambeth, in Surrey. Accordingly Lord Sunderland was brought to prove the presentation to the king.

The document was asserted by the prosecution to be a libel, because it urged that the Declaration was based upon an illegal power.

The counsel for the defence argued :— Defence.

1. That the petition was a perfectly innocent petition, presented by proper persons in a proper manner. The bishops are intrusted with the general care of the church, and also by stat. 1 Eliz. c. 2 with the carrying out of that Act—the Act of Uniformity; and had a right to petition in this case.

2. As to their questioning of the dispensing power, no such power exists. The declarations of parliament sufficiently show this. In 1662, when King Charles wished to extend an indulgence to the Dissenters, it was asserted by parliament that laws of uniformity 'could not be dispensed with but by act of parliament.' In 1672, when the king had actually issued such a Declaration, upon the remonstrance of parliament he caused the said Declaration to be cancelled, and promised that it should not become a precedent. In 1685, when the king announced that he had certain officers in his army 'not qualified according to the late tests for their employments,' parliament passed an Act of Indemnity that 'the continuance of them in their employments may not be taken to be dispensing with that law without act of parliament.' Until the last king's time, the power of dispensing 'never was pretended,' on which point Somers, as junior counsel for the defence, quoted 'the great case of *Thomas* v. *Sorrel*,' to show that it was there agreed by all that there could be no suspension of an act of parliament but by the legislative power.

The two questions left to the jury were :—1. Was the publication proved ?—a mere question of fact. 2. Was Charge.

the petition libellous? *Wright*, L. C. J. and *Allybone*, J. directed them that it was; *Holloway* and *Powell*, JJ. thought that it was not.

The jury having retired and been locked up all night, the next morning delivered a verdict of *Not Guilty*.

Notes.—This trial illustrates several questions of great constitutional importance. 1. The document presented to the king might be argued to be privileged on the ground of its being a *petition*, and this raises the question of the limitation to the right of petition.[1] 2. The Crown charged the petitioners with sedition, and thence starts an inquiry into the nature of a seditious libel.[2] 3. This alleged seditious character again arises out of the denial of the dispensing power, and the principal argument both of the bar and the bench turned upon the great question of this prerogative. The last point will be found discussed in a Note; to enter upon the others would carry us too far.

Points of law on the trial.

But upon the trial there were several points of law raised by the bishops' counsel which it may be useful to summarize:[3]

1. It was argued that they should not be compelled to plead, because the return made to the writ of Habeas Corpus by the Lieutenant of the Tower did not state that they had been committed by the Privy Council as such, but by certain 'lords of the Privy Council.'

The objection was bad, since the warrant, the really important document, was sufficient in point of form.

2. Nor as lords of parliament had they been legally committed, since 'seditious libel' was not a breach of the peace, for which sureties may be demanded. But privilege of parliament holds except in the cases of 'treason, felony, and the peace,'[4] (*i.e.* breach of the peace), and this privilege secures those entitled to it against commitment.

Both these points were overruled by three judges: *Powell*, J., in each case would like to wait to consider precedents, and would give no opinion.

[1] On the history of the right to petition, see 1 May, C. H. E. 444–451; Cox, Inst. Engl. Gov. 260–265.

[2] On the controversies as to a seditious libel, Cox, Inst. Engl. Gov. 278–293; 2 May, C. H. E. 107–117, and *passim*.

[3] They will be found stated at greater length and discussed in 2 Phill. S. T. 333–355.

[4] Coke, 4th Inst. 25.

3. Counsel for the bishops claimed a right of imparlance: the crown lawyers maintained that the accused must plead *instanter*. The older practice appears to have been in favour of an imparlance; but the practice for the last twelve years had been the other way. Since the Revolution it has varied. The point, at all events, was overruled on this occasion.

4. Strong objections were taken as to the nature of the proof of handwriting offered—but these only show how unsettled was the law upon the subject of proof of handwriting. As to some, though not as to all of the bishops, evidence was offered, which would now be considered quite satisfactory in *kind*—of witnesses who had seen them write, or received letters from them, and so could testify as to identity of handwriting, and so on. The judges being divided as to the sufficiency of the proof, other evidence was required, and therefore Blathwayt was produced.

5. The last objection was that there was no sufficient proof even of publication in Middlesex. To this the Court very strangely agreed, and Lord Sunderland therefore was produced to prove the actual delivery of the document into the king's hands—which might reasonably have been inferred from the facts already in evidence.

Bate's Case (The Case of Impositions).

4 *Ja. I.*, 1606.

Lane, 22; 2 *S. T.* 371; *Br.* 247—305.

History. An information was exhibited in the Exchequer against John Bate,[1] a Levant merchant, for refusing to pay an impost of 5*s.* per cwt. on currants ordered by letters patent from the king, in addition to a statutory poundage of 2*s.* 6*d.* per cwt. Upon this statute defendant relied, and opposed payment of the 5*s.* as illegally imposed.

Judgment. *Judgment* of the four barons was unanimous *for the crown:*

1. The king's power is twofold—ordinary and absolute. The ordinary power, or common law, cannot be changed without parliament. But the king's absolute power is *salus populi*, and is not directed by the rules of common law, but varies according to the wisdom of the king. Judgment in matters of prerogative must be not according to common law, but according to exchequer precedents.

2. All customs are the effect of foreign commerce: but all commerce and foreign affairs are in the absolute power of the king. The seaports are the king's gates, which he may open or shut to whom he pleases, and he has therein absolute power.

3. If he may restrain the person by a *ne exeat* he may *à fortiori* restrain goods, and if he may restrain these absolutely he may do so *sub modo*.

4. If he may impose, he may impose what he pleases.

Petition of grievances. While the case was pending the matter had already been taken up by the Commons, who upon presenting a

[1] I follow Mr. Gardiner in thus writing the name.

petition were informed by the king of the decision of the law courts in his favour. In July, 1608, a Book of Rates was published under the authority of the great seal, imposing heavy duties upon almost all mercantile commodities, to be paid to the king, his heirs and successors. When parliament again met in 1610 they debated the whole question, and were not deterred by the king's message that they were not to do so. The debate lasted four days, the principal speakers being Sir Francis Bacon and Yelverton[1] for the right of imposition, and Hakewill and Whitelocke on the other side.

Argument against the right.

The main points in the argument against the king's right to impose were:

I. Customs are *consuetudines*, and the very name shows that this "duty is a child of the common law."

II. But by the common law the duty is a thing certain not to be enhanced by the king without consent of parliament. Where the common law has made provision, the king may not impose arbitrarily.

All our kings, from Hen. III., have sought increase of customs by way of subsidy from parliament; sometimes by way of prayer and entreaty, and for a short time; sometimes even by way of loan, undertaking to repay. All which is an argument that they had no such absolute power. Even Edw. III., than whom 'there was not a stouter, a wiser, a more noble and courageous prince,' prayed his subjects for a relief for the maintenance of a war (14 Edw. 3, stat. 1, c. 21). Where merchants alone granted a subsidy on wool, the Commons complained, 27 Edw. 3, and in stat. 36 Edw. 3, c. 11, it is expressly forbidden.

From the Conquest till the reign of Mary—480 years,

[1] In the State Trials (ii. 477), Yelverton is said to have spoken against the right, and Whitelocke's speech is erroneously attributed to him. *Notes and Queries*, 3 Ser. ix., 382, x. 39, 111.

there were only *six* impositions by *twenty-two* kings: and yet all these, even when borne for a short time, were complained of, and upon complaint removed. Other so-called impositions were 'dispensations or licences for money, to pass with merchandise prohibited by act of parliament to be exported.'

III. Even if the king had such power at common law, it is utterly abrogated by statutes, the chief being:—

1. Magna Carta, c. 30. 2. 25 Edw. 1, c. 7. 3. De Tallagio non concedendo[1] (cited as 34 Edw. 1, st. 4). 4. 14 Edw. 3, st. 1, c. 21.

These debates resulted in a *Petition of Grievances*[2] to the king, 1610: which not only complained of impositions in general, but also sought relief in respect of certain imposts on alehouses and sea coal: and begged 'that all impositions got without consent of parliament may be quite abolished and taken away.' A bill was introduced with this object, but dropped in the House of Lords. The impositions on sea coal and alehouses were remitted, but no further concession was made. A bill was again introduced in the parliament of 1614, but the Lords declined a conference upon the subject, and the parliament was dissolved without anything having been done.

Note.—The decision in this case was considered by Coke and Popham to have been right (see 12 Rep. 33); and it was treated by the judges in 1628 as conclusively established. For a full discussion of the whole controversy, see 2 Gardiner, Hist. Engl., 1–12, 70–1, 75–87, 236–48.

[1] The De Tallagio non concedendo, though recited as a statute even in the Petition of Right, and held to be so by the judges in 1637, seems to have been, as suggested by Dr. Stubbs, a mere abstract of Edward's confirmation of the Charters (Select Charters, 487).

[2] Printed more fully than in the S. T. in Petyt, *Jus Parliamentarium*, 318.

R. *v.* Hampden (The Case of Ship Money).

13 *Car. I.*, 1637.

3 *S. T.* 825; 2 *Rushworth*, 257; *Br.* 306-370.

History. King Charles issued writs for the collection of ship money to the City of London, and other maritime towns, in 1634. In 1635, having been advised by ten out of the twelve judges that when the good and safety of the whole kingdom was concerned—of which he was to be considered the sole judge—he might enforce a general payment, he addressed writs throughout the kingdom. The next year he secured the opinion of all twelve judges in his favour, and issued writs for a third time. On Hampden's refusing to pay the amount at which he was assessed, proceedings were taken against him in the Exchequer.

He demurred, and the demurrer was heard in the Court of Exchequer Chamber.

Mr. *St. John* and Mr. *Holborne* argued for Hampden.

Argument for defendant. It is conceded (1) that the law of England provides for foreign defence; and (2) lays the burthen upon all; (3), that it has made the king sole judge of dangers from abroad, and when and how the same are to be prevented; and (4), that it has given him power by writ to command the inhabitants of each county to provide shipping for the defence of the kingdom.

The question is only *de modo*. This must be by the forms and rules of law. As without the assistance of his judges the king applies not his laws, so without the assistance of parliament he cannot impose. Parliament is the king's court.

The law has provided for the defence of the realm both at land and sea by undoubted means: (1), by tenure of land giving service in kind and supply; (2), by prerogatives of the crown; (3), by supplies of money

for the defence of the sea in times of danger. These are the ordinary settled and known ways appointed by the law. The way proposed in the writ by altering the property in the subjects' goods without their consent is unusual and extraordinary. But they may not run to extraordinary, when ordinary means will serve. The king may call parliaments when he chooses.

That parliament is the means of supply appointed for extraordinary occasions is shown both by reason and authority. The very form of the writ of summons shows that without their consent the commons are not chargeable.

A series of statutes were quoted showing the same thing. 1. Charter of Will. I.; 2. Magna Carta; 3. 25 Edw. I., c. 5; 4. *De Tallagio non concedendo*[1]; 5. 14 Edw. III., st. 2, c. 1; 6. 25 Edw. III.

There may indeed be times of sudden danger when property ceases, but this is only at times when the course of law is stopped and the courts of justice shut up. But here the time that will serve for bringing in the supplies appears by the writ, viz., seven months.

So much as to defence in general. That of the sea has nothing special. Most or all of the precedents are the charging sea-towns which are discharged of defence at land. The charge is therefore double in the one case and single in the other. Any towns not maritime ought not to be charged, which is the very case of the defendant.

Holborne, who argued also for Hampden, would not admit that the king was the proper judge of danger, except when the danger was so imminent that parliament could not be consulted.

Lyttelton, S.-G., and *Bankes*, A.-G., argued for the crown.

Judgment. The judges gave judgments: *Weston*, *Crawley*, *Berkley*, *Vernon* and *Trevor* for the king; *Croke*, *Hut-*

[1] See note, p. 22.

ton and *Denham* for the defendant; *Bramston*, L.-C.-J., and *Davenport* also for the defendant, but on technical grounds; *Jones* and *Finch*, C.-J., for the king. Judgment.

Croke reiterated, and added somewhat to *St. John's* arguments.

The judgment of *Finch*, C.-J., may be thus summarized:

The defence of the kingdom must be at the charge of the kingdom. The sole interest and property of the sea, by our laws and policy, is in the king, and sea and land make but one kingdom, and therefore the subject is bound to the defence of both. Parliament is not the only means of defending the kingdom. The king is not bound to call it but when he pleases, and there was a king before a parliament. The law which has given the interest and sovereignty of defending and governing the kingdom to the king, also gives him power to charge his subjects for its defence, and they are bound to obey. The precedents show that though for ordinary defence they go to maritime counties only, when the danger is general they go to inland counties also. Acts of parliament to take away the royal power in the defence of his kingdom are void. 'They are void acts of parliament to bind the king not to command the subjects, their persons and their goods, and to pay their money too, for no acts of parliament make any difference.'

Seven of the judges deciding against the defendant, *judgment* was for the crown.

This decision gave much offence to the nation, and three years afterwards, in the Long Parliament, a statute (16 Car. I., c. 14) was passed declaring all the proceedings contrary to 'the laws and statutes of the realm, the rights of property, the liberty of the subject, and the Petition of Right,' and 'vacating and cancelling' the judgment. Later History.

Note I.—On the Dispensing Power.

The existence of a suspending and dispensing power as a prerogative of the crown is one of the questions which have most engaged the partisanship of historical and constitutional writers, and its true history has been consequently much debated. Writers like Lord Campbell and Lord Macaulay deny that it has ever existed; but Hallam cautiously observes that 'it was by no means evident that the decision in *Sir Edward Hales' case* was against law.'[1] An argument for its existence will be found to have been urged in a law court so recently as 1815.[2]

It is certain that the power in our earlier history was often employed; and not unfrequently with the approval of the people. It seemed indeed almost a corollary from the king's power of pardon: if he might dispense with the penal consequences of an offence when it had been committed, it seemed natural that he should be able to supersede the necessity of pardon by a previous licence to commit the action.

It is said to have been first used by Henry III. in imitation of the power of dispensation claimed by the Pope, to all of whose rights the crown claimed to succeed. It is true that even then protest appears to have been made against the introduction into the civil courts of the old ecclesiastical '*non obstante*' clause. Nevertheless instances of dispensation became numerous, and parliaments of Richard II. permit the king to exercise the power, while reserving a right to disagree thereto; and this power is amply recognized by the Commons in the reign of Henry IV.

In the reign of Henry VII. it was determined by all the judges in the Exchequer Chamber that although an act of parliament forbade any person to hold the office of sheriff for more than a year, and expressly barred the operation of a *non obstante* clause, nevertheless a grant of a shrievalty for life, if it contained such a clause, would be valid. And this case was

[1] 3 Const. Hist. 62.
[2] By Dr. Lushington in the *Case of Eton College*, 1815.

not only approved by Fitzherbert, by Plowden, by Coke, and by all the judges in *Calvin's case*, but it was followed in *Thomas* v. *Sorrel*.

The claim was admitted to a certain extent on the part of the Commons at a conference between the two Houses on the Petition of Right. The Declaration of Rights itself only declares that the dispensing power of the crown *as it has been exercised of late* is illegal; and when the prerogative was wholly abolished by the Bill of Rights (1 W. & M. ses. 2, c. 2, s. 13), a proviso was inserted to save all prior charters, grants, and pardons.

On the other hand the protests frequently made against its exercise were made rather against particular occasions of its use. When Charles II., wishing to employ the suspending power, issued his Declarations of Indulgence, parliament protested, and he was obliged to take them back. Of this much is made in the argument for the Seven Bishops, and Macaulay considers it a complete abandonment of the right. But no protest was made on his suspending other statutes, as for example the Navigation Act.

We may fairly sum up perhaps by saying that the power had been frequently exercised, though always subject to protest when its particular exercise was disapproved. But its legality was fully admitted by the law courts, and there was nothing in the concessions made, for example, by Charles II., to amount to an express renunciation or statutory abolition of the claim. It was the obstinate determination of James II. to employ the power as a means of undermining the constitution, that led to a new settlement of the kingdom, and the formal abolition of a prerogative of which the people had become impatient.

Barnardiston *v.* **Soame.** 26 *Car. II.*, 1674.

Pollexfen, 470; 6 *S. T.* 1063; *Br.* 796—836.

Double return.

Soame, as sheriff of Suffolk, had made a double return for an election of knight of the shire. Thereupon the plaintiff, as one of those returned, brought an action against him for maliciously making a second return, and on a trial at bar obtained a verdict with 800*l.* damages. The judgment, after having been affirmed on motion in arrest, was taken on a writ of error into the Exchequer Chamber.

Judgment.

The sheriff, as to declaring the majority, is judge, and no action will lie against a judge for what he does judicially. But besides, a double return is a lawful means for the sheriff to perform his duty in doubtful cases. To admit this action would be against the common law, and would introduce a dangerous novelty. The sheriff is the officer of parliament, and is accountable only to them. The judgment must be reversed.

H. L.

On a fresh writ of error to the House of Lords, this reversal was affirmed.

Decided, therefore, that an action did not lie against the sheriff for making a double return.

Subsequent history.

In this case, concurrently with the proceedings at law, the question was discussed in parliament, where the election of the plaintiff was adjudged good, and the defendant committed for making the double return. After the decision of the Lords an act was passed to provide for the difficulty (7 & 8 Will. 3, c. 7, made perpetual by 12 Anne, st. 1, c. 15), making double returns actionable by the aggrieved party.

Note.—Nevill v. *Stroud*, 1659, 2 Sid. 168, was an earlier case of an action against a sheriff, or returning-officer, but,

though much argued, was never decided. It was held, again, in *Prideaux* v. *Morrice*, 7 Mod. 13, that an action did not lie *at common law* against a returning-officer for making a false return. The Court also held that the judging of the right of election belongs to the House of Commons, and that it would be very inconvenient and absurd to try it in a court of law, for thus 'one might have judgment and damages against him in Westminster Hall for a matter in which he might have done his duty by a vote of the House of Commons.' This opinion was severely criticised by *Willes*, C. J., in *Wynne* v. *Middleton*, 1745: 1 Wils. 125 (in the Exch. Chamb.).

Ashby *v.* White and others. *2 Anne*, 1704.

Lord Raymond, 938; 14 *S. T.* 695–888; 1 *Smith, L. C.* 264.

History. The plaintiff in this case, being duly qualified, had tendered his vote in an election of burgesses for parliament, and this had been refused by the defendants as returning officers. Although the candidates for whom he would have voted were duly elected, the plaintiff brought an action, and laid the damages at 200*l.* He obtained a verdict, with 5*l.* damages and costs.

On motion in the Queen's Bench in arrest of judgment, on the ground that the action did not lie, judgment was given for the defendants, *Holt*, L. C. J., dissenting. Upon writ of error in the House of Lords, this was reversed on the grounds set forth by *Holt* in the court below.

Judgment. The franchise is a benefit, and there must be a legal remedy to vindicate it. The right to vote is founded upon the elector's freehold, and matters of freehold are determinable in the king's courts. This is a proper tribunal to try the question; 'who hath a right to be in the parliament is properly cognizable there, but who hath a right to chuse is a matter settled before there is a parliament.' And again the House of Commons cannot take cognizance of particular men's complaints, nor can it give satisfaction in damages.

Decided:—That an action will lie against a returning officer for refusing the vote of a duly qualified person: and that the refusal is an injury, though it be without any special damage.

The House of Lords gave judgment in Ashby's favour on the 14th January, 1704. The Commons immediately took the matter up, and after debates lasting from the 17th to the 25th January, on this latter day they passed

resolutions that the determination of the right of election of members is the proper and exclusive business of the House of Commons; that they cannot judge of the right of election without determining the right of electors; and that an action in any other court was therefore a breach of privilege. The Lords also discussed the question, and passed counter-resolutions.

Meanwhile five other 'Aylesbury men' had brought similar actions against the constables of their borough. They were thereupon committed to prison (Dec. 5) by the House of Commons for a breach of their privileges, together with their counsel and solicitors, and they failed to obtain their discharge on habeas corpus, the majority of the judges holding against Lord C. J. *Holt*, that the House of Commons were the sole judges of their own privileges. The burgesses then applied for a writ of error to take the question to the House of Lords, which is a writ of right. Nevertheless the House of Commons resolved that no writ of error lay in this case, and petitioned the queen not to grant it. The Lords now also appealed to the queen by an address, in which they show that writs of error from inferior tribunals are *ex debito justitiæ*, writs of right, and upon the queen's referring the question to the judges, ten out of twelve certified to that effect. They further complain that the resolutions of the House of Commons amount to a direct repeal of the laws protecting the liberty of the subject by means of habeas corpus, and pray that she will order the writs to issue. The reply of the queen was, that she would have granted the writs of error prayed for, but that it was necessary at once to put an end to the session, and she knew, therefore, that no further proceedings could be taken.

The prorogation of parliament left the Aylesbury men free to pursue their legal remedies, without the intervention of privilege, and they obtained verdicts and execution against the returning officer.

Note.—Apart from the important discussion of the privileges of parliament which arose out of this case, it is of importance in connection with the duties and liabilities of a returning officer. It is observed in *Tozer* v. *Child*, 1857,[1] that the report of this case in Raymond is defective in failing to show that Lord *Holt* based his judgment on the fraud and malice of the defendant. A fuller form of the judgment was published from a manuscript in 1837, and here, indeed, this point is directly dealt with. It is not quite clear, however, that this is so important an element in the case. The duty of receiving a vote is probably *ministerial*, and not judicial, and this seems rather to be the ground of *Holt's* decision. There seems to have been nothing in the case to show *express* malice; nor would this be an essential ingredient of liability if the office is purely ministerial, as *Holt* appears to have held (see *esp.* at p. 950 in Lord Raymond).[2] The later cases are indeed hardly consistent with *Ashby* v. *White* upon this view, and the attempt to reconcile them is therefore intelligible enough. In *Cullen* v. *Morris*,[3] 1819, it was held that the duties of a returning-officer were partly ministerial and partly judicial, and in *Tozer* v. *Child*, *u.s.*, churchwardens acting as returning officers in an election of vestrymen are spoken of in one of the judgments as '*quasi* judges.'

[1] 26 L. J. Q. B. 151.
[2] So in the fuller report (p. 20), "Certainly he is only a ministerial officer to execute the Queen's writ."
[3] 2 Stark. 577.

Case of Lord Shaftesbury. 29 *Car. II.*, 1677.

1 *Mod.* 144; 16 *S. T.* 1269.

History. Lord Shaftesbury, with two other peers, had been committed to the Tower by an order of the Lords 'during the pleasure of this House for high contempts committed upon this House.'

Some months afterwards Lord Shaftesbury was brought up in the King's Bench on a writ of *habeas corpus*, and the question of the sufficiency of the return was argued.

It was admitted that there had been many instances of commitment by each House, but the question had never been determined in a court of law.

Judgment. The judges held that the return would have been held ill and uncertain in the case of an ordinary court of justice. But the Court was bound to respect the most High Court of Peers, and the return was not examinable in the King's Bench. It would be otherwise if the session was over.

Held:—That the prisoner must be remanded.

Later History. In the next session this application to an inferior court was voted a breach of privilege, and Lord Shaftesbury was called upon to beg their Lordships' pardon for bringing his *habeas corpus*. This he did, and was discharged.

R. *v.* Eliot, Hollis and Valentine.

5 *Car. I.*, 1629.

Cro. Car., 181; 3 *S. T.* 954.

History. This was an information by the Attorney-General against Sir John Eliot, Denzil Hollis, and Benjamin Valentine, for seditious words spoken in the House of Commons, and for a tumult in the same place.

The defendants denied the jurisdiction of the court, on the ground that offences done in parliament could only be punished in parliament.

Judgment. After arguments in which the whole question of the privilege of free speech in parliament was discussed, and the defendants relied, among other things, upon the Act passed 4 Hen. 8 in Strode's case, the judges, *Hyde*, L. C. J. *Jones*, *Whitlocke*, and *Croke*, held that an offence committed in parliament against the king or his government may be punished out of parliament, and that the Court of King's Bench had jurisdiction.

The defendants were ordered to answer, but refused, and were thereupon sentenced to pay heavy fines.

Later History. In 1641 the Long Parliament passed a resolution that the exhibiting of this information was a breach of the privilege of parliament.

In 1667 the Commons and the Lords passed resolutions that this judgment was illegal, and also that the Act of Parliament, commonly called Strode's Act, is a general law declaratory of the ancient and necessary rights and privileges of parliament.

The Lords further ordered that the proceedings in the King's Bench should be brought before them by a writ of error, and on the 15th of April, 1668, it was ordered 'that the said judgment shall be reversed.'

Note.—Strode and others had been fined in the Stannary Court, and imprisoned in default, for having, 'with other of this House,' introduced into parliament certain bills which the tinners did not like. It was enacted,[1] on his petition, that the judgment and execution should be void, and further, that all suits, etc., against him 'and every other of the person or persons afore specified, that now be of this present Parliament or that of any Parliament hereafter shall be, for any bill, speaking, reasoning, or declaring,' were to be void. The language of the Act is sufficiently obscure to justify Hallam's conclusion that it rather appears 'not to have been intended as a public Act.'[2] This was the last instance in which the privilege of freedom of speech in parliament was questioned. By the Bill of Rights[3] it was declared 'that the freedom of speech and debates or proceedings in Parliament ought not to be impeached or questioned in any Court or place out of Parliament.' Hallam, indeed, suggests that it is not a necessary consequence from the reversal of this judgment that no action committed in Parliament is punishable in a court of law, and that the plea in the case of Eliot could not have been supported as to the imputed tumult in detaining the Speaker in the chair.

[1] 1 The Statutes Revised, 374.
[2] 1 C. H. 4 n.
[3] 1 W. & M., Sess. 2, c. 2.

Rex *v.* Lord Abingdon. 33 *Geo. III.*, 1793.

1 *Esp.* 226.

History. This was an information for a libel. Lord Abingdon, in giving notice in the House of Lords of his intention to bring in a Bill to regulate the practice of attorneys, made a speech charging an attorney with improper conduct. This speech he then, at his own expense, had printed in several of the public papers.

The defendant argued in person that by the law and custom of parliament he was not punishable for anything said in parliament.

Judgment. Lord *Kenyon*, L. C. J., held that though the court had no jurisdiction to punish anything said in parliament, and a member of parliament had a right to publish his speech, he could not make it a vehicle of slander.

The defendant was convicted and punished.

Decided:—That if a member of parliament publishes a speech delivered in parliament containing slanderous charges it is a libel, for which an information lies.

Rex *v.* Creevey. 53 *Geo. IV.*, 1813.

1 *M. & S.* 273.

History. The defendant had been tried and found guilty of publishing a libel. He was a member of parliament, and had published in a newspaper a correct report of a speech delivered by him in the House of Commons, an incorrect account of it having already appeared. The speech as published by him contained reflections on one Robert Kirkpatrick.

Judgment. On motion for a new trial, on the ground of misdirection, Lord *Ellenborough*, L. C. J., and the Court of King's Bench,

Held:—That if a member of parliament publishes outside the House reflections upon an individual, the occasion will not rebut the usual inference of malice.

Note.—In the case of *Rex* v. *Lord Abingdon*, it may be observed that there was actual malice, though the case was not decided on that ground; while the case of *Rex* v. *Creevey* shows that express malice is not an essential ingredient of the offence. In the absence of express malice, the question of publication would probably not now be decided in the same way. Lord Campbell, indeed, suggested that a speech published *bona fide* by a member for the information of his *constituents* would be held privileged.[1] But as it is well established that a member is elected to serve not merely for his own constituency, but for the whole kingdom, it is difficult to see why the privilege should not be held to cover any *bonâ fide* publication. The tendency of modern decisions has been in favour of the press, but it is not easy to understand why a newspaper owner who, after all, is only one of the general public, should have a greater privilege than a member of parliament.

[1] In *Davison* v. *Duncan*, 7 E. & B., at p. 233.

Burdett *v.* **Abbot.** 51 *Geo. III.*, 1811.

14 *East*, 1–163; 4 *Taunt.*, 401; 5 *Dow*, 165.

History. This was an action of trespass against the Speaker of the House of Commons for breaking into the plaintiff's house, and carrying him to the Tower.

Pleas. The defendant pleaded that the plaintiff and himself were members of a parliament then sitting; that it had been resolved in parliament that a letter from the plaintiff in a newspaper was a breach of its privileges, and that the Speaker should issue his warrant for the plaintiff's commitment to the Tower.

Judgment. The case was first argued on demurrer before Lord *Ellenborough*, L. C. J., and the Court of King's Bench; then affirmed on a writ of error before Sir *Jas. Mansfield*, C. J., in the Exchequer Chamber; and again affirmed in the House of Lords by Lord *Eldon*, C., and Lord *Erskine*.

Held:—That the power of either House to commit for contempt is reasonable and necessary, and well established by precedents. 2. That the execution of a process for *contempt* justified the breaking into the plaintiff's house.

Note.—Sir Erskine May points out, that the right to judge contempts and to punish them, is so essential to the functions of a legislature, that it has been repeatedly exercised in the United States. He adds, "the same power has also been exercised by colonial legislatures." But it has been held in the Privy Council that the *lex et consuetudo parliamenti* do not belong to the supreme legislative assembly of a colony, and that colonial parliaments have no right to punish by imprisonment for contempts committed within their walls. *Doyle* v. *Falconer*, 1866, L. R. 1 P. C. 328; 4 Moo. P. C., N.S., 203; or beyond them, *Kielley* v. *Carson*, 1842; 4 Moo. P. C., 63; and *Fenton* v. *Hampton*, 1858; 11 Moo. P. C. 347. Any such authority, therefore, must rest upon statute, and has

in some cases been confined; see *Speaker of Legislative Assembly of Victoria* v. *Glass*, 1871; L. R. 3 P. C. 560. The power of expelling disorderly persons they possess of course, but this is not peculiar to them; as Lord Abinger, C. B., has said, "every person who administers a public duty has a right to preserve order in the place where it is administered, and to turn out any person who is found there for improper purposes."[1]

Compare the case of the *Sheriff of Middlesex*, *post* (p. 42) and note.

[1] *Jewison* v. *Dyson*, 1842, 9 M. & W. 540, at 586.

Stockdale *v.* Hansard. 2 *Vict.*, 1839.

9 *Ad. & E.* 1; *Br.* 870–959.

History. A book published by Stockdale had been described by two inspectors of prisons in a report to the government, as 'disgusting and obscene.' This report was printed and sold by the Hansards by order of the House of Commons. The plaintiffs brought an action for libel, with 5000*l.* damages.

Plea. The defendants pleaded that they had printed and sold the report only in pursuance of the order of the House of Commons, and that the House had resolved that the power of publishing reports and proceedings 'is an essential incident to the constitutional functions of parliament.'

Demurrer. To which the plaintiffs demurred, that the known and established laws of the land cannot be superseded or altered by any resolution of the House of Commons.

Argument. It was argued by the defendants, who had been directed by the House to plead to the action merely to inform the Court, that the act complained of was done in exercise of its authority, and in the legitimate use of its privileges: that the courts of law are subordinate to the Houses of Parliament, and are therefore incompetent to decide questions of parliamentary privilege. But if the Court were competent to inquire into the existence of the privilege, it could be shown to have long existed.

Judgment for the plaintiff, *per* Lord *Denman*, L. C. J.:—

Judgment. Parliament is supreme: but neither branch of it is supreme by itself. The privilege of each House may be the privilege of the whole parliament, but it does not follow that the opinion of its privileges held by either House is correct. The privilege of committing for contempt has known limits: it is, *e.g.*, only till the close of the session. There are, in fact, many cases where the

law courts have discussed questions of parliamentary privilege.

2. Nor has it been shown that the privilege of publication exists. Here the publication of the opinions referred to was not in relation to any matter before the House, and more copies were ordered to be printed than were necessary for the use of its members.

Decided:—That the House of Commons, by ordering a report to be printed, cannot legalize the publication of libellous matter.

Note.—In consequence of these proceedings, an Act, 3 & 4 Vict. c. 9, was passed, in virtue of which any person called upon to defend an action in respect of publications ordered by either House of Parliament, may bring before any court of law in which such proceeding has been commenced, a certificate from the Lord Chancellor, or the Clerk of the Parliaments, or the Speaker of the House of Commons, or the clerk of the same House, that the publication was under the authority of the House of Lords or the House of Commons, and such court or judge shall thereupon stay all such proceedings. And this is to apply also to all *bonâ fide* extracts from any paper thus printed.

Sheriff of Middlesex's Case. 3 *Vict.*, 1840.

11 *Ad. & E.* 273; *Br.* 960–966.

History. This case arose out of *Stockdale* v. *Hansard.* The sheriff of Middlesex, in pursuance of a writ from the Queen's Bench, had levied execution upon property of the Messrs. Hansard. The House of Commons committed him for contempt: and upon motion to discharge him on habeas corpus, Lord *Denman*, L. C. J., delivered judgment.

Judgment. The judgment in *Stockdale* v. *Hansard* was correct. The technical objections taken to this warrant from the Speaker are insufficient. On a motion for a habeas corpus, the return, if it discloses a sufficient answer, puts an end to the case: and I think the production of a good warrant is a sufficient answer.

Held:—That a court of law cannot inquire into the grounds of a commitment for contempt by the House of Commons.

Note.—Compare the earlier cases of *Burdett* v. *Abbot*, 1814, (*supra*, p. 38), and *R.* v. *John Cam Hobhouse* (afterwards Lord Broughton), 1820; 2 Chitty, 207. In the latter case the Court said, "The House of Commons have adjudged (as appears by the warrant) that the gentleman on the floor has been guilty of a contempt in having published a seditious libel, of which he has acknowledged himself to be the author. We cannot enquire into the form of the commitment, even supposing it is open to objection on the ground of informality."

Howard *v.* **Gosset.** 5 & 6 *Vict.*, 1842.

Carr. & M. 380; 10 *Q. B.* 359.

History. Howard had been Stockdale's attorney, and, refusing to appear before the House of Commons when summoned to be examined, was committed for contempt. It was admitted that the officers had exceeded their authority in remaining in plaintiff's house to await his return. Upon this ground he obtained damages at nisi prius.

In a second action in the Queen's Bench, he obtained judgment on the ground that the warrant did not charge any offence, nor assign any cause for the arrest.

Judgment. This judgment was unanimously reversed in S. C.

Held:—That the House of Commons has power to order the attendance of witnesses, and to arrest them if they refuse to appear. 2. A warrant of the House of Commons is the writ of a superior court, and, where not appearing to be in excess of jurisdiction, is valid.

Note.—In *Lines* v. *Lord Charles Russell*[1]: 1852: the plaintiff, who had been committed by a warrant of the chairman of the St. Alban's Election Committee, brought an action of trespass against the Serjeant-at-arms. By the Election Petitions Act, 1848, if any witness misbehaved in giving or refusing to give evidence before an election committee, the chairman might, by their direction, commit him. The objection was taken to the warrant that it did not state that Lines was a witness, or that he had misbehaved. *Held:* that the warrant was entitled to the same respect as that of the highest court in the country; and the jury were directed to find for the defendant. A rule for a new trial was obtained, but not proceeded with.

[1] May, Parl. Practice, 9 ed., 81; 19 L. T. 364.

Bradlaugh *v.* **Erskine.** 46 *Vict.*, 1882.

47 *L. T. Rep.* 618.

History. This was an action by the plaintiff, who had been elected member of parliament for Northampton, against the Serjeant-at-Arms of the House of Commons for an assault in forcibly preventing the plaintiff from entering the House.

The defendant pleaded a previous order of the House that the Serjeant-at-Arms should remove the plaintiff from the House until he should engage not further to disturb its proceedings.

Argument. The plaintiff demurred, and the demurrer was argued before *Field*, J. It was argued by the Attorney-General for the defendant that the order of the House must be held to be valid and binding, and not open to review in a court of law, as dealing with matter that had arisen within the House, which had full right to deal as it would by all matters arising within its own walls in relation to its own procedure.

Judgment. *Held*:—That the defendant's plea was good.

Bradlaugh *v.* **Gosset.** 48 *Vict.*, 1884.

L. R. 12 *Q. B. D.* 271.

History. This was an action against the Serjeant-at-Arms, who had been directed by the House of Commons to remove the plaintiff from the House until he should engage not further to disturb the proceedings. The plaintiff asked to have that order declared to be void as beyond the power and jurisdiction of the House to make, and an order restraining the defendant from preventing the plaintiff from entering the House and taking the oath as a member.

The defendant demurred, and the demurrer was argued before *Coleridge*, L. C. J., *Mathew* and *Stephen*, JJ., who allowed the demurrer.

Judgment. *Held:*—That the House of Commons is not subject to the control of the law courts in matters relating to its own internal procedure only. What is said or done within its walls cannot be inquired into elsewhere.

NOTE II.—ON PRIVILEGE OF PARLIAMENT AND THE LAW COURTS.

The whole subject of the Privilege of Parliament is much too large to be treated in a short note.[1] But we must not omit to consider what is for our purpose the most interesting aspect of the subject, and one of the most difficult questions in Constitutional law, viz., the extent to which courts of law will adjudicate upon matters of privilege. The violent controversies produced by this question between the House of Commons and the Courts of Law are already indicated in the cases reported; nor is it at all impossible that similar contests may again occur.

Each House of Parliament, and therefore the House of Commons, claims to be the sole judge of its own privileges and of what constitutes a breach of them. So much the courts have always admitted—that the House of Commons possesses the authority to commit summarily for contempts which exists in every superior court of law;[2] and the courts always give a liberal construction to the warrants of such commitments, which are therefore not reversible for form. But this has not contented the House of Commons. They have not thought it sufficient to enforce their undoubted privileges, but have claimed in effect a power of legislation by asserting their exclusive right to entertain all questions connected with privilege; and have at the same time claimed that the courts of law should act ministerially only in matters of privilege, accepting or enforcing any declaration of either House. They have even denied that the judges could ascertain what is the law of privilege, as though it were a matter of inspiration vouchsafed only to themselves.[3]

The opinions of the judges in the matter have varied very much. During the last century the tendency was strong in favour of declining to decide questions of privilege in any way, and the natural result followed, that privilege was pushed to

[1] Cox, Inst. Eng. Gov. 85 foll., 209 foll. Sir Erskine May, P. P., 9th ed., cc. iii.–vi., 68–191.

[2] Per *Ellenborough*, C. J., in 14 East, 138, *Burdett* v. *Abbot*, and cp. Lord *Erskine* in the House of Lords on the same case, 5 Dow, at 199.

[3] Argument of Attorney-General, in *Stockdale* v. *Hansard*, 14 East, *l. c.*

an extravagant extent. The House of Commons constantly decided the subjects of common actions as matters of privilege, solely because one of the parties interested happened to be one of their own body.[1] Even in the case of *Ashby* v. *White*, however, *Holt*, L. C. J., expressly asserts the right and duty of the courts to know the law of Parliament as part of the common law of the land. And the later decisions have been much more favourable to the right of the courts to entertain questions of privilege. For this *Stockdale* v. *Hansard* is the leading authority. There Lord *Denman*, C. J., lays down that although the House of Commons has a right to declare what are and have been its privileges—it may not under cover of a declaration create any new privilege. That would be to give to the resolution of a single branch of the legislature the force of a legislative enactment. It is true that the House of Commons disclaims the power to make new privileges. But the claim they do assert will amount to the same thing, if they alone are competent to declare the extent of their privileges, and if a court of law is concluded from going behind their declaration.[2]

The present condition of the question is, according to Sir Erskine May, in the highest degree unsatisfactory. 'Assertions of privilege are made in Parliament, and denied in the courts; the officers who execute the orders of Parliament are liable to vexatious actions; and if verdicts are obtained against them, the damages and costs are paid by the Treasury. The parties who bring such actions, instead of being prevented from proceeding with them by some legal process acknowledged by the courts, can only be coerced by an unpopular exercise of privilege which does not stay the actions.'[3]

The latest discussion of the subject is to be found in the cases of *Bradlaugh* v. *Erskine*, and *Bradlaugh* v. *Gosset*.

[1] Denman, L. C. J., in *Stockdale* v. *Hansard*, and for some flagrant instances, see Cox, Inst., Engl. Gov., 212, *note*.

[2] The true distinction is made by Lord Clarendon, who construes the doctrine that the House of Commons are the only judges of their own privileges, to mean that they are the only judges in cases where their privileges are offended against, and not that they only can decide what are and what are not their privileges. 1 Hist. Rebellion, pp. 562–564.

[3] Parliamentary Practice, 9th ed., p. 190.

Calvin's Case. 6 *Ja. I.*, 1608.

7 *Rep.* 1; 2 *S. T.* 559; *Br.* 4–26.

History. King James was anxious that the union of the two crowns should confer mutual naturalization upon his English and Scotch subjects; and when the English House of Commons was unwilling that this should be so, the question was raised by two actions in the name of Robert Calvin, a *postnatus* of Scotland, *i.e.*, one born after the union of the crowns. On demurrer the case was argued in the Exchequer Chamber before the *Lord Chancellor* and twelve judges.

Argument

Allegiance is the obedience due to the sovereign; and persons born in the allegiance of the king are his natural subjects, and no aliens. The allegiance is not limited to any spot—*nullis finibus premitur*—and is due to the king in his natural capacity, rather than his politic, of which he has two, one for England, and one for Scotland. One allegiance is due by both kingdoms to one sovereign.

The point is, whether internaturalization follows that which is one and joint, or that which is several; for if the two realms were united under one law and parliament, the *postnatus* would be naturalized. As it is, the king is one; but the laws and parliament are several.

Judgment. *Held*:—That the *postnati* are not aliens, and may therefore inherit land in England.

Note.—In the case of *Craw* v. *Ramsey*, 21 Car. 2, 1670,[1] the question was discussed whether naturalization in Ireland conferred naturalization in England, and the judges were divided, two for and two against.

[1] Vaugh. 274.

NOTE III.—ON ALLEGIANCE AND ALIENS.

Note.—The reasons given for the decision in *Calvin's case* were based upon the exaggerated notions of 'divine right' characteristic of the Stuarts, and of many lawyers of that time. By the Act of Union, however, which has united the two kingdoms into one, the doctrine involved has been rendered unnecessary and obsolete. Allegiance is defined by Coke to be 'a true and faithful obedience of the subject due to his sovereign.' It is correlative with protection, and so ceases when the sovereign can no longer protect his subjects.[1] It is not governed by locality, but clings to the subject wherever he is: *nemo potest exuere patriam.* And it is indefeasible—its obligation is for life. This was the earlier English doctrine as to allegiance, but it has been much modified by modern legislation. Allegiance may now be renounced or acquired; and is regulated by the Naturalization Acts of 1870 and 1872 (33 & 34 Vict. c. 14, 35 & 36 Vict. c. 39). As to aliens, stat. 7 & 8 Vict. c. 66 (now repealed by the former Act) relaxed the law. It enacted that every person born of a British mother should be capable of holding real or personal estate. Alien friends might hold every kind of personal property, except chattels real, and might hold lands for a term of years not exceeding twenty-one years, for purposes of residence or business. The *Naturalization Act*, 1870, provides that real and personal property of every description may be acquired and held by an alien in the same manner as by a natural-born British subject, and a title to real and personal property may be derived through an alien, precisely as through a natural-born British subject. It also provides for the naturalization of aliens, and enables British subjects, to become naturalized in a foreign state, and to be re-admitted to British nationality.[2]

[1] 'Allegiance is the tie or *ligamen* which binds the subject to the king in return for that protection which the king affords the subject.' 2 Bl. Comm. 366.

[2] Cf. Forsyth's chap. (ix.) on 'Allegiance and Aliens,' pp. 333–340; 2 May, C. H. Engl. 296–304; and L. C. J. *Cockburn's* book on 'Nationality,' 1869. The question of allegiance is discussed in *Doe* d. *Thomas* v. *Acklam*, 1824 (2 Br. C. 779), when it was held that children born in the United States of America since the recognition of independence of parents born there before it, and continuing to reside there afterwards, are aliens.

Campbell *v.* **Hall.** 15 *Geo. III.*, 1774.

Lofft, 655; *Cowp.* 204 (20 *S. T.* 239–354, *and* 1387).

History. This was an action against the collector of customs in the island of Grenada to recover money paid as duty upon exports, on the ground that the duty had been illegally imposed.

It appeared that Grenada had been ceded by capitulation in Feb. 1762. By a proclamation in October, 1763 the crown had delegated to the governor power to legislate with the advice and consent of a council and an assembly of representatives. In July, 1764, letters patent were issued under the great seal, imposing a duty upon exports from Grenada.

The question was, whether the crown, after the proclamation of 1763, could still impose a new duty, and was argued three times upon a special verdict before Lord *Mansfield*, L. C. J., who gave judgment for the plaintiff.

Judgment. *Held*:—That the crown having once delegated the power of legislation (including taxation) to a local assembly, cannot afterwards exercise the power of levying taxes there.

Bankers' Case. 2 *W. & M.*, 1690.

1 *Freeman*, 331; *Skinn.* 601; 14 *S. T.* 1; *Br.* 228–234.

History. Charles II. had been accommodated with loans by bankers on the security of public monies, and a stat. 19 Car. 2, c. 12, made the 'orders and tallies' transferable. In 1671, payment was postponed for a year, but afterwards continued. In 1677, the king granted them annuities out of the hereditary excise, which were paid till 1683. They then fell into arrear, until at the Revolution suits were begun to enforce payment. The procedure was by petition to the Barons of the Exchequer, and was then argued upon a writ of error in S. C.

Argument. The question was, (1), whether the grant of the king bound his successors, *i.e.*, could the king alienate the revenue fixed in him and his successors; (2), whether the petitioner had adopted a proper remedy.

Judgment. *Held:*—By a majority of the judges (1) that the king could alienate the revenues of the crown; (2) that the petitioners had adopted a proper mode of seeking remedy.

The judgment, though reversed by Lord Keeper *Somers*, was reaffirmed by the House of Lords.

Note.—No benefit was derived from the Petition of Right in this case,[1] until by 12 & 13 Will. 3, cc. 12, 15, the hereditary excise after 26 December, 1701, was ordered to be charged with an annual sum equal to interest at 3 per cent., until redeemed by repayment of one half of the principal sum.

[1] *Per* Lord *Mansfield*, L.C. J., in *Macbeath* v. *Haldimand*, 1 T. R. 172.

Viscount Canterbury *v.* The Attorney-General.

5 & 6 *Vict.*, 1842.

1 *Phillips*, 306.

History. This was a petition of right, in which the petitioner claimed compensation from the crown for damage done to his property while Speaker of the House of Commons by the fire which in 1834 destroyed the House of Parliament. The fire had been caused, the petitioner alleged, by the negligence of the servants of the crown, who had employed too large a quantity of the old tallies from the Exchequer, and so overheated certain stoves. To the petition the Attorney-General put in a general

Argument. demurrer. The argument turned on the meaning of the maxim 'The king can do no wrong,' which, it was maintained, covered civil torts as well as criminal acts.

The other side argued that no construction could be right which should enable the king to wrong the subject without making compensation, for the prerogatives exist for the advantage of the people. It was admitted, indeed, that for the personal negligence of the sovereign, no proceedings could have been maintained.

Judgment. *Lord Lyndhurst*, C., allowed the demurrer.

Decided:—That a petition of right does not lie to recover compensation from the crown for damage due to the negligence of the servants of the crown.

Tobin *v.* **The Queen.** *27 & 28 Vict.*, 1864.

33 *L. J.* (*C. P.*), 199; 16 *C. B. N. S.* 310.

The captain of one of her Majesty's ships had taken and destroyed an innocent vessel, as a vessel engaged in the slave-trade. The owners brought a petition of right against the crown to recover damages. History.

The case was argued before *Erle*, C. J., and the Court of Common Pleas.

Held:—1. That Captain Douglas was an officer of parliament, and not of her Majesty. 2. That the officer was not acting within his authority, and therefore could not make his principal liable. 3. That a petition of right cannot be maintained against the crown to recover damages for a trespass. Judgment.

Note.—The words of the judgment seem to show that an action might lie against Captain Douglas, as having exceeded his authority. Comp. *Madrazo* v. *Willes; Buron* v. *Denman*, *post*, and the note on the 'Liability of Officers' (p. 92). The judgment in this case was approved by the Court of Queen's Bench, in *Feather* v. *The Queen*,[1] 1865, where it was held that a petition of right does not lie to recover damages for an infringement of patent rights by the crown. In *Thomas* v. *The Queen*,[2] 1874, it was decided that a petition of right lies to recover unliquidated damages for a breach of contract.

[1] 35 L. J. Q. B. 200.
[2] L. R. 10 Q. B. 31.

The Queen *v.* The Lords Commissioners of the Treasury. 35 *Vict.*, 1872.

L. R. 7 *Q. B.* 387.

History. This was a rule calling upon the Lords of the Treasury to show cause why a mandamus should not issue commanding them to authorise the proper officer to pay certain sums to the treasurer of the county of Lancaster. These sums were part of the costs of certain prosecutions in the said county which are now by statute defrayed out of the Consolidated Fund, which part had been disallowed by the Treasury.

The rule was argued before *Cockburn*, L. C. J., *Blackburn*, *Mellor* and *Lush*, JJ.

Judgment. *Held:*—That the Lords of the Treasury receive the monies granted by parliament to her Majesty as servants of the crown, that no duty is imposed upon them as between them and the persons to whom such monies are payable, and that mandamus will not lie to enforce payment of such monies.

NOTE IV.—ON REMEDIES AGAINST THE CROWN.

The ordinary modes of action are not available against the king; this is a practical corollary from the lawyer-made maxim that the king can do no wrong. But the corollary, like the maxim, is not as old as the constitution. Edward I. made 'an act of state that men should sue him by petition, but this was not agreed unto in parliament.' In 43 Edward III. it was resolved 'that all manner of actions did lie against the king as against any lord.'[1]

But the notion which set the king above the actions to which the subject is liable became established, and *Petitions of right* and *Monstrans de droit* became the only remedies for injuries proceeding from the crown and affecting the rights of property.

Where the crown was in possession of any hereditament or chattel, and the petitioner controverted the title of the crown, he set forth his claim, and the answer *soit droit fait al partie* (let right be done to the party) being endorsed thereon by the king, a commission issued to try the question as between party and party.[2] But no petition of right or other form of action can be maintained against the crown for a tort or wrong properly so called. The advice to be given by the Attorney-General was discretionary, and he was responsible only to parliament, and the crown.[3] Where the two conflicting titles appeared upon record the proceeding by *monstrans de droit* was adopted, which was to pray the judgment of the court upon the facts as established.

But the proceedings upon petitions of right have been simplified by the Petitions of Right Act, 1860 (23 & 24 Vict. c. 34), and now they may be brought in any of the superior courts of common law or equity in which an action might have been brought if it had been a question between subject and subject,

[1] 4 S. T. 1304.
[2] Some details as to Petitions of Right will be found in 1 Todd, Parl. Gov. 239–242.
[3] See 7 Lord Campb., Chancellors, 425 n.

and the practice in ordinary actions extends to them as far as possible.

If the subject is injured by a *grant* by the crown made to other parties, the remedy is by a writ of *scire facias*, which may be directly issued by the crown, or on the interposition of a subject by the fiat of the Attorney-General.

As the crown may not be sued directly, so too the property of the crown may not be reached by a suit against a public officer in his official capacity. The distinction made in the cases is that where a statutory duty is imposed upon any one, then, whether he be a public officer or not, mandamus will lie to enforce it. In *The King* v. *Lords of the Treasury*: 1835;[1] a mandamus was granted, as the Court took the view that the Lords were 'merely parties who have received a sum of money as trustees for an individual under the provisions of an act of parliament.' (*Per* Lord *Denman*, L. C. J.); but the authority of this case was doubted in the present case, and it was also dissented from by the Court of Appeal, *Brett*, M. R., and *Bowen*, L. J., in the recent case of *The Queen* v. *The Commissioners of Inland Revenue:* 1884.[2] As is said by *Cockburn*, L. C. J., in the present case, 'Independently of authority, I think there is no doubt whatever that we must look upon them (*i.e.*, the Lords of the Treasury) as servants of the crown. The money is voted by parliament as a supply to the crown. . . . . It is true that the money is appropriated to a specific purpose, and it is true that the money can only be appropriated to the purpose so specified in the Appropriation Acts. It is also true that . . . . it is a supply to be got at by a certain specified process, and it is true that the crown must issue warrants or orders under the sign manual to enable the Lords Commissioners of the Treasury to have this money paid to them. But, nevertheless, when the money is paid, I can entertain no doubt that it is paid to the Lords of the Treasury as servants of the crown.' And the present M. R. says in the recent case above cited: 'The right of this prosecutor, if any, seems to me to be a right against the crown in respect of monies which are in the hands of the crown and belong to the crown. If that is so, then no action will lie, because an action will not lie against the servants of the crown.'

[1] 4 A. & E. 286 (cp. 976, 984, 999).
[2] L. R. 12 Q. B. D. 461.

Darnel's Case (Five Knights' Case). 3 *Car. I.*, 1627.

3 *S. T.* 1; *Br.* 162–207.

History. Sir Thomas Darnel was one of five knights who had been imprisoned for refusing to obey privy seals for forced loans to the king. The warrant was signed by the Attorney-General, and stated that they were 'committed by the special command of his majesty.'

Judgment. The rule has been, where an insufficient cause of commitment has been expressed, to deliver the party. But where no cause has been expressed, the prisoner has ever been remanded. *Held:*—That the return was sufficient.

Further history. The five knights accordingly remainded in prison until they were discharged by the king in council, 29 Jan., 1628, the *Habeas Corpus* having been moved on Nov. 3.

When parliament met in March there was much discussion, and a conference took place between the two Houses, when Sir Dudley Digges, Littleton, Selden, and Sir E. Coke argued for the Commons.

The conference resulted in the *Petition of Right*, which insists that: 1. By Magna Carta no freeman is to be taken or imprisoned but by the lawful judgment of his peers, or by the law of the land. 2. By 28 Edw. III., no man is to be imprisoned without being brought to answer by due process of law. To this Petition the king at length assented.

Note.—The doctrines here set forth were finally vindicated by their incorporation in 1679 into the Habeas Corpus Act, 31 Car. II. c. 2, 'An Act for the better securing the Liberty of the Subject.'

Shanley *v.* **Harvey.** 2 *Geo. III.*, 1762.

2 *Eden*, 126.

History. A young lady, the owner of a negro servant called Harvey, had made him a *donatio mortis causâ.* Her administrator filed a bill against the negro and his trustees, claiming the gift as part of the deceased's estate.

Judgment. The bill was dismissed with costs by *Northington*, C. *Held:*—As soon as a man sets foot on English ground he is free. A negro may maintain an action against his master for ill-usage, and may have a *Habeas Corpus* if restrained of his liberty.

Note.—The subject of *Slavery* is perhaps strictly not a question of Constitutional Law; since personal liberty in this sense is one of those primary general rights, maintainable not against the government as such, but against all the world. Yet in deference to ordinary usage the chief cases connected with the doctrine of slavery in England are here included.

The case above is given as an earlier assertion of the English doctrine than Lord *Mansfield's* famous judgment in *Sommersett* v. *Stewart*, although the question is here less directly before the Court. The latter decision, while affirming the doctrine expressed by Lord *Northington*, was only extorted from Lord *Mansfield* after he had delayed judgment for three terms, and had vainly struggled to induce the parties to a compromise.

It is noticeable that only in 1729 Mr., afterwards Lord, *Talbot*, A.-G., and Mr. *Yorke*, afterwards Lord *Hardwicke*, S.-G., had given an opinion 'that a slave coming from the West Indies to Great Britain doth not become free,' and pledged themselves to the London merchants to save them harmless in the matter.[1]

[1] *Per* Lord *Stowell* in *The Slave Grace's Case*, 2 Hagg. 105.

Sommersett's Case. 2 *Geo. III.*, 1771–2.

Lofft, 1–19; 20 *S. T.* 1–82; *Br.* 65–119.

History. Sommersett, a Virginian slave, having been brought to England by his master, left his service and refused to return. His master seized him and committed him to the custody of a ship captain for the purpose of sending him abroad to be sold as a slave. The captain was ordered by writ of *Habeas Corpus* to return the body of James Sommersett with cause of detainer into the King's Bench.

Sommersett's cause was argued by Mr. Hargrave:—

Argument. 1. The only kind of slavery recognized by English law is Villeinage, and the last instance of that in the Courts was 15 James I. (*Pigg* v. *Caley*, *q. v.*) Even here the judges had always presumed in favour of liberty, and the law recognized no villein save by blood or the villein's confession. 2. The fact that no new form of slavery has since arisen affords a presumption that the law will admit none.

Judgment. Lord *Mansfield*, L. C. J., delivered judgment that the return was insufficient. 'The state of slavery . . . . is so odious that nothing can be suffered to support it but positive law . . . . I cannot say this case is allowed or approved by the law of England, and therefore the black must be discharged.' *Decided:*—That slaves coming into England cannot be sent out of the country by any process to be there executed.

Note.—All this case expressly decided was, that a slave coming here cannot be sent away again against his will. In *Knight* v. *Wedderburn*, 1778, a Scotch case decided a few years later, Sommersett's Case was relied on, and its principle extended, to declare that the slave was not bound to serve his master here (33 Mor., Dict. Decis., 14,545).

Forbes *v.* **Cochrane (and Cockburn).** 55 *Geo. III.*, 1815.

2 *Barnewell & Cresswell*, 448.

History. The plaintiff was a British merchant domiciled in Spanish Florida, and held there, as it was lawful to do, a number of slaves. Thirty-eight of these deserted one night, and were found next day upon a British ship of war lying within a mile of the shore. The commander declined to give them up, and an action was therefore brought by the plaintiff against him and against his commander-in-chief, who had endorsed his conduct.

A jury found for the plaintiff subject to a special case which was heard before *Bayley*, *Holroyd*, and *Best*, JJ. and decided for the defendants.

Judgment. In an English ship of war, which may for this purpose be considered as a 'floating island,' these slaves were subject only to English law—and by that they were not slaves. The defendants did all they lawfully could to assist the plaintiff; they permitted him to endeavour to *persuade* the slaves to return.

Decided, therefore, that no action will lie against an officer who receives slaves into a British vessel and refuses to give them up.

Note.—Mr. Justice Stephen says (2 Hist. Cr. L. 55) that the judgment in this case proceeded on the ground that the ship was not in Spanish waters at the time. But it is not clear whether the ship was in Spanish or American waters, and the judgment appears rather to have proceeded on the ground that they had got "beyond the territory where the law recognizing them as slaves prevailed" (*per Holroyd*, J.).

Case of Le Louis. 57 *Geo. III.*, 1817.

2 *Dods. Adm. R.* 210–264.

History. A French vessel had been captured by an English cutter for being employed in the slave-trade, and had been condemned in the Vice-Admiralty Court at Sierra Leone. An appeal was brought to the English Admiralty Court.

The judgment of the Court below was reversed by Sir *William Scott* (Lord *Stowell*).

Judgment. The right of search can be exercised only in time of war. It is true that with professed pirates there is no state of peace. But trading in slaves is not piracy, nor is it a crime, by the law of nations.

Note.—It is worth observing, that only a few years after this judgment, Mr. Justice Story, in the United States, held slavery to be a violation of the law of nations, in the case of *La Jeune Eugénie*.[1] The doctrine thus asserted was, however, not recognised by the Supreme Court in the later case of *The Antelope*.[2] As to what constitutes piracy, see Bernard, *Neutrality of Great Britain*, 118.

[1] 2 Mason, 90.
[2] 10 Wheaton, 211.

Case of the Slave Grace (The King *v.* Allan).
8 *Geo. IV.*, 1827.

2 *Hagg. Adm. R.* 94–134.

History. Mrs. Allan, of Antigua, had brought a female slave to England in 1822, and the next year returned, taking the slave with her to Antigua. Some time afterwards the slave was seized by the Custom House at Antigua as forfeited to the king, on suggestion of having been illegally imported in 1823. The case was decided in favour of Mrs. Allan in Antigua, and an appeal was brought by the crown to the Admiralty Court in England.

Judgment. Per Lord *Stowell.* This question turns really upon the count that the slave Grace, 'being a free subject of his majesty, was unlawfully imported as a slave from Great Britain into Antigua.'

Held:—That the slave having accompanied her mistress into England, and there taken no step to establish her freedom, upon returning voluntarily to a country where slavery was legal, reverted to the condition of a slave; and her stay in England had only put her liberty, as it were, into a sort of parenthesis.

Pigg *v.* Caley. 15 *Ja. I.*, 1617.

Noy, Reports, 27.

History. The plaintiff brought an action of trespass against Caley for stealing his horse.

Plea. The defendant pleaded that he was seised of a manor to which the plaintiff was a villein regardant, and that defendant and all those &c., have been seised of the plaintiff and his ancestors.

Verdict and judgment. The plaintiff replied that he was free, and the issue was found for him, and confirmed upon motion in arrest of judgment.

Note.—This case of *Pigg* v. *Caley* is interesting as the last instance in which an assertion of villeinage was made in an English court of law.

Crouch's case in 9 & 10 Eliz.[1] is usually said to be the last, but, as is pointed out in Mr. *Hargrave's* argument in the case of *Sommersett*, there are four later instances to be found in print, in 18 Eliz., 1 Jas. I., 8 Jas. I. which was never determined, and finally that here reported in 15 Ja. I.

In the case of Crouch, Butler entered into certain lands of W. Crouch as into lands purchased by his villein, and made a lease of them to his servant Fleyer, who entered, and was ejected by Crouch. Upon an action for this ejectment Crouch pleaded not guilty, and the verdict upon the issue passed for him against the plaintiff.

In another action of *Fleyer* v. *Crouch* it was alleged 'that Butler and his ancestor, and all those whose estate he hath, have been seised of Crouch and his ancestors as of villeins regardant from time whereof memory, &c.' After a trial of the issue and a special verdict it was found 'that the ancestors of Butler were seised during all that time of the ancestors of Crouch, as of villeins regardant, &c., until the first year of Henry VII., and that Crouch was a villein regardant to the said manor, and that no other seisin of Crouch or his ancestors

[1] Dyer, 266, pl. 11 (*Butler* v. *Crouch*); 283, pl. 32 (*Fleyer* v. *Crouch*).

was had since, but whether the said seisin of the manor aforesaid be in law a seisin of the aforesaid Crouch and his ancestors from the aforesaid first year of Henry VII., they pray the advice and discretion of the court, &c. . . . and afterwards it was resolved by all the Justices of the Bench that the plaintiff shall not recover upon this verdict, and that the prescription had failed since the 1st Henry VII.'

Many causes tended to the gradual decay and extinction of villeinage in England, such as the development of the towns, the wars carried on against France, the growing expensiveness of serf labour, and the discontent of the peasants themselves, as testified in various risings. But the cause with which we are here most specially concerned, was the discouragement of villeinage by the courts of justice. They always presumed *in favorem libertatis*, and threw the whole burden of proof upon the lord, not only in the writ *De nativo habendo*, where he was plaintiff, but also in the writ *De homine replegiando*, where the villein was plaintiff. And nonsuit of the lord in a *De nativo habendo* was a bar to another such writ, and a perpetual enfranchisement; but a nonsuit of the villein in a *De libertate probanda*, which was one of the writs for asserting the claim of liberty against the lord, was no bar to another writ of the like kind.

Manumissions were inferred from the slightest circumstances of mistake or negligence in the lord which legal refinement could strain into an acknowledgment of the villein's liberty.[1]

[1] 20 S. T. 35-47.

Rex *v.* Broadfoot. 15 *Geo. II.*, 1743.

Foster, 154; 18 *S. T.* 1323.

History. At the gaol delivery held at Bristol Broadfoot was indicted for the murder of Calahan, a sailor belonging to one of his Majesty's ships. The deceased had been shot by Broadfoot, while the latter was endeavouring to avoid being pressed. The men engaged in pressing were not accompanied by a commissioned officer in the terms of the press-warrant.

Direction to jury. Mr. Serjeant, afterwards J., Foster, as Recorder, directed the jury that everything the press-gang did must therefore be regarded as an illegal attempt upon the liberty of the person concerned, and told them to find the prisoner guilty of manslaughter. But 'this being a case of great expectation,' he thought it proper to deliver his opinion that—

Pressing for the sea-service is legal, provided the persons impressed are proper objects of the law, and those employed in the service are armed with a proper warrant.

Note.—The practice of impressment, though now of merely historical interest, is important in connexion with constitutional doctrines, and especially the English doctrine of personal liberty. Nor is it, perhaps, altogether impossible to imagine a revival of the practice.

Impressment of soldiers was always less used than that of sailors, and since the statute 16 Car. I. c. 28 has never been exercised except by statute, as was the case, for example, in 1706 (4 Anne, c. 10), in 1757 (30 Geo. II. c. 8), and in 1779 (19 Geo. III. c. 10, during the American war). Hallam[1] has overlooked this last statute, when he speaks of 1757 as the last occasion.

The impressment of sailors was generally regarded as a pre-

[1] 3 Const. Hist. 212.

rogative of the crown, though its legality was questioned by some, as, *e.g.*, by Emlyn, who, writing in 1730,[1] observes that he does not know that "the practice ever had the sanction of one judicial determination." Foster, also, could find no decision upon it, though he has no doubt as to its legality. His view was afterwards affirmed by Lord *Mansfield* in *R.* v. *Tubbs*, 1776;[2] "the power of pressing is founded upon immemorial usage;" and Lord *Kenyon* in *Ex parte Fox*, 1793;[3] "the right of pressing is founded on the common law, and extends to all seafaring men." The illegal impressment of persons not liable to be impressed was a trepass, for which damages might be recovered: *Flewster* v. *Royle*, 1808.[4]

[1] Preface to 'State Trials,' p. xxvii. [2] Cowp. 512.
[3] 5 T. R. 276. [4] 1 Campb. 187.

Wilkes *v.* **Wood.** 3 *Geo. III.*, 1763.

19 *S. T.* 1153; *Br.* 548–558.

Wood was secretary to a secretary of state, and, with a constable and several king's messengers, entered into Mr. Wilkes's house, broke open his locks, and seized his papers. The warrant upon which this was done merely directed the messenger 'to make strict and diligent search for the authors, printers, and publishers of a seditious and treasonable paper, entitled *The North Briton*, No. 45, and these or any of them having found, to apprehend and seize, together with their papers.' Wilkes brought an action of trespass—damages, 5,000*l.* The action was tried before *Pratt*, C. J. [Lord Camden], and a special jury. History.

The judge laid it down to the jury that the doctrine that the power of issuing general warrants—without names—is vested in a secretary of state, is illegal and unconstitutional. Judgment.

Verdict for the plaintiff—damages, 800*l.*

Leach *v.* **Money.** 6 *Geo. III.*, 1765.

3 *Burr.* 1692, 1742; 19 *S. T.* 1001; *Br.* 525–547.

History. This was an action of trespass by Wilkes's printer against a king's messenger for trespass and false imprisonment. The warrant, under the hand of Lord Halifax, principal Secretary of State, required the defendant and others to search for the authors, printers, and publishers of the seditious libel entitled *The North Briton*, and to apprehend them together with their papers. He was apprehended and released after four days, as he turned out not to be the printer. The jury found for the plaintiff—400*l.* damages.

The case was argued but decided on the particular ground that the warrant had not been followed.

Argument. Upon a bill of exceptions these warrants have been sanctioned by long custom; and a secretary of state, as a sentinel for the public peace, must have the power to issue them. As a conservator of the peace, he is protected by statute 7 Ja. 1. c. 5; 24 Geo. 2, c. 44.

Per Lord *Mansfield*, L.C.J.

Judgment. There is no case for these uncertain warrants. Nor is it enough that the usage has been so. A usage, to grow into law, ought to be a general usage; this is but the usage of a particular office, contrary to the usage of all other justices. No degree of antiquity can give sanction to a usage bad in itself.

The warrant had not been pursued, for the person taken up was neither author, printer, nor publisher. As the justice would not be liable, the officer has no protection.

Entick *v.* **Carrington.** 6 *Geo. III.*, 1765.

19 *S. T.* 1030; *Br.* 558–613.

History. Carrington, with three other persons, king's messengers acting under a warrant from a secretary of state, had forcibly entered Entick's house, as the author of a seditious libel, and carried away his books and papers: upon which he brought an action of trespass. The jury returned a special verdict, on the ground that the defendant had acted upon a warrant from a secretary of state, based upon an information, and that it had been the custom for secretaries of state since the Revolution to issue such warrants.

This special verdict was twice argued, and judgment was delivered by Lord *Camden*, L.C.J., for the plaintiff.

Judgment. A secretary of state is the king's private secretary, but has not in consequence the authority of a magistrate. Nor has any magistrate such a power of commitment without a power to examine upon oath. No privy councillor, as such, has a right to commit. As to the power of seizing papers, 'that is not supported by one single citation from any law book extant, and is claimed by no other magistrate in this kingdom, not even by the Lord Chief Justice of the King's Bench.'

Decision, therefore:—'We are all of opinion that the warrant to seize and carry away the party's papers, in the case of a seditious libel, is illegal and void.'

NOTE V. ON GENERAL WARRANTS.

The practice of issuing general warrants, in which no particular person was specified, is said to have originated with the Star Chamber. It had then been revived by the Licensing Act of Charles II., and authorised to be used by the Secretary of State. And the practice is supposed to have continued after the expiration of that Act in 1694. At all events, it had been frequently exercised even after the Revolution.

Their illegality, however, was finally settled, as well as the illegality of warrants to seize papers, by the judgments in the cases reported. Each of the cases given decides a different point: *Leach* v. *Money* that a general warrant to seize some person not named is illegal; *Wilkes* v. *Wood* decides the equal illegality of a warrant to seize the papers of a person not named; while *Entick* v. *Carrington* carries the latter point further, and establishes the illegality of a warrant to seize the papers of a person named—manifestly a sort of general warrant as regards the papers. These decisions are supported by two able judgments—of Lord *Mansfield*, in *Leach* v. *Money* in error, and of Lord *Camden* in *Entick* v. *Carrington*.

In a subsequent action against Lord Halifax, the Secretary of State, 1769,[1] tried before *Wilmot*, C. J., and a special jury, Wilkes recovered £4,000 damages, and we are told that 'the verdict was much less than the friends of the plaintiff expected, and so little to the satisfaction of the populace, that the jurymen were obliged to withdraw privately, for fear of being insulted.'

The House of Commons, while the law courts were thus engaged, was also debating the subject: and in 1766 passed resolutions declaring such warrants not only to be illegal, but if executed on the person or papers of a Member of the House to be a breach of privilege. As to this declaration, it is to be observed that Lord *Mansfield* in a speech in the House of

[1] 19 S. T. 1406–15.

Lords, objected to it on the ground that declarations of the law by either House of Parliament have no binding force, and are not necessarily to be adopted by the courts of law.

At the same time he affirms that 'general warrants are no warrants at all, because they name no one;' with which may be compared Wilkes' refusal to obey the warrant, as 'a ridiculous warrant against the whole English nation.'[1]

[1] 2 May, C. H. E. 255–262.

Lane *v.* **Cotton (and Another.)** 12 *Will. III.*, 1699.

1 *Salkeld*, 17 ; 1 *Ld. Raymond*, 646.

History. Sir Robert Cotton and another were appointed post-masters-general by letters patent, with power to appoint deputies and servants. The plaintiff sued them for the loss of some exchequer bills which were stolen from a letter in the post-office.

Judgment. The case came before *Holt*, L.C.J., and three other judges. *Holt* held that the defendants were liable, but the three other judges held that it is impossible for the Postmaster-General, who is to execute this office in such distant places at home and abroad, and at all times by so many several hands, should be able to secure everything.

Decided:—That a public officer is not liable for the negligence or defaults of his subordinates.

Note.—Lord *Raymond* says (at p. 658), that the plaintiff intended to bring a writ of error, upon which the defendants paid the money, but this appears to be very doubtful. This decision was followed in the case of *Whitfield* v. *Lord Le Despencer*, 1778; Cowp. 754, decided by Lord *Mansfield*, L.C.J., and the Court of King's Bench.

Macbeath *v.* **Haldimand.** 26 *Geo. III.*, 1786.

1 *T. R.* 172.

History. Haldimand, as governor of Quebec, had entered into certain contracts with the plaintiff to be supplied with goods for the public service. Upon the ground of their being unreasonable, only a part of his charges was paid by the Treasury, and he was left to his remedy for the rest.

Hereupon he brought an action for his further claim against the defendant, and the jury, under direction, found for the latter.

Judgment. Upon motion for a new trial the rule was discharged by Lord *Mansfield*, L.C.J., *Willes*, *Ashurst*, and *Buller*, JJ.

Held:—That the defendant is not personally liable. The goods were for the use of the crown. Great inconveniences would result from considering a governor or commander as personally responsible in such cases. For no man would accept of any office of trust under government upon such conditions.

Gidley *v.* **Lord Palmerston.** 3 *Geo. IV.*, 1822.

3 *Brodr. & B.* 275.

History. This was an action against the defendant, as secretary at war, by the executor of a war-office clerk for arrears of retired allowance, which the defendant was authorised to pay. At the trial a verdict was found for the plaintiff subject to the opinion of the Court.

The special case was argued before *Dallas*, C.J., and the Courts of Common Pleas.

Judgment. *Held:*—'That an action will not lie against a public agent for anything done by him in his public character or employment, though alleged to be, in the particular instance, a breach of such employment.'

Note.—With this and the previous case may be compared *O'Grady* v. *Cardwell*, 1872; 21 W. R. 340 (cp. 20 W. R. 342); and *Palmer* v. *Hutchinson*, 1881; L. R. 6 App. Cas. 619; *Hettihewage Siman Appu and others* v. *The Queen's Advocate (of Ceylon)*, 1884, L. R. 9 App. Cas. 571 (P. C.)

Grant *v.* **Secretary of State for India in Council.**
40 *Vict.*, 1877.

L. R. 2 *C. P. D.* 445.

History. The claim alleged that the plaintiff, Colonel Grant, had been in the service of the East India Company, and after the Indian forces had been transferred to the crown, was called upon to retire in pursuance of a general order issued by the Governor-General of India with the defendant's sanction by which unemployed officers ineligible for employment by reason of misconduct or physical or mental inefficiency, might be retired upon a pension. He was compulsorily retired, and a notification published in the *Gazette*. The publication of this notice was contended by the plaintiff to be a libel.

Judgment The case was argued upon demurrer before *Grove*, J., and it was—

Held:—(1) That the defendant could make no contract with a military officer in derogation of the crown's general power to dismiss him at pleasure; and (2) That the publication in the *Gazette* was an official act under the authority of the crown, for which the defendant was not responsible in an action of libel.

Fabrigas *v.* **Mostyn.** 15 *Geo. III.*, 1773.

Cowp. 161; 1 *Smith, L. C.*, 658.

History. This was an action in the Common Pleas against the governor of the island of Minorca for illegally imprisoning and banishing the plaintiff without trial, on the ground that the plaintiff had presented to him a petition in an improper manner. The question left to the jury was whether the plaintiff's behaviour was such as to show that he was about to stir up sedition and mutiny. They gave him 3,000*l.* damages.

Argument. The case was argued on error in the King's Bench, on the ground for the defendant, that no action would lie in England for an act committed in Minorca.

Judgment. Judgment *per* Lord *Mansfield*, L. C. J.: It is impossible there could ever exist a doubt but that a subject born in Minorca has as good a right to appeal to the king's courts of justice as one who is born within the sound of Bow bell. To repel the jurisdiction of the king's court you must show another jurisdiction; but here no other is even suggested. The governor must be tried in England, to see whether he has exercised the authority delegated to him legally and properly.

Decided:—'An action does most emphatically lie against the governor.'

Note.—It was also argued for the defendant that no action would lie against him as governor acting in a judicial capacity. To this Lord *Mansfield* assented, but pointed out that it had not been pleaded, nor was it even in evidence, that the defendant sat as judge of a court of justice. It may be noted that Minorca was a British possession from 1763 to 1782.

Cameron *v.* **Kyte.** 5 & 6 *Wm. IV.*, 1835.

3 *Knapp, P. C. C.* 332.

History. An officer called the vendue master in the colony of Berbice was entitled to sell all property sold by public auction, and to receive a commission of 5 per cent. on the purchase money. This rate was altered by the governor in 1810 to 1½ per cent., and the local courts refused to entertain a petition from the deputy vendue master. In 1824 Charles Kyte became deputy vendue master, and, until 1829, received commission according to the former rate. Cameron had purchased an estate in this last year, and refused to pay more than 1½ per cent., and the supreme court ordered him to pay the difference. He appealed to the king in council.

Judgment. Judgment was delivered by *Parke*, B. The governor might, with the consent of the Court of Policy, have reduced the rate of commission, but there was no such consent. The king, it is admitted, might have this power, but there is no special instruction in the governor's commission for this quasi-legislative act. Can it then be inferred from the nature of the office of governor? There is no authority to show that a governor can be considered as having delegation of the whole royal power in any colony; and his simple act, not expressly or implicitly authorised by his commission, is not equivalent to such an act done by the crown itself, and is consequently not valid.

Judgment accordingly for the respondent.

Hill *v.* **Bigge.** 5 *Vict.*, 1841.

3 *Moo. P. C. C.* 465; *Br.* 623–650.

History. An action had been brought against the governor of the island of Trinidad, Sir George Hill, in the court of civil jurisdiction there, for a debt incurred in England, and before his appointment as governor. He appeared under protest, and pleaded that he could not be sued in the said court. The plea was overruled, and the case decided against him.

Argument. He now appealed to the Privy Council, and it was argued that he, being by the terms of his commission vested with legislative as well as executive power, was not within the jurisdiction of the courts in the colony he governed.

Judgment. In the judgment (delivered by Lord *Brougham*). The judgment of the colonial court was affirmed, and it is pointed out that, (1) the authority of a governor is only delegated from the sovereign, and is strictly limited by the terms of his commission; (2) The crown itself may be sued, though in a particular manner; (3) The judges of the courts in this country are liable to be sued in their own courts.

Decided:—That an action will lie against the governor in the court of his colony.

Phillips *v.* **Eyre.** 30 & 31 *Vict.*, 1867.

L. R. 4 *Q. B.* 225; 6 *Q. B.* 1.

History. This was an action of assault and imprisonment against Eyre, who was governor of Jamaica, and upon the outbreak of a rebellion there had proclaimed martial law, and taken various measures for the suppression of the rebellion, in the course of which the acts were committed for which the action was now brought.

Plea. The defendant pleaded that the grievances complained of were covered by an Act of Indemnity which had been passed in 1866 by the Jamaica legislature, and that the action therefore could not be maintained.

Replication. To this the plaintiff replied, (1) that the defendant was still governor at the passing of the Act of Indemnity, which could, therefore, only have become law by his consent; (2) that an Act of the Jamaica legislature could not bar his right to maintain an action in England.

The defendant demurred, and the demurrer was heard before *Cockburn*, L. C. J., in the Queen's Bench, and then upon error in Sc. Cam., where judgment was delivered for the defendant by *Willes*, J.

Judgment. *Held*:—(1) That the governor of a colony can legally give his consent to a bill in which he is personally interested; (2) That the Act of a colonial legislature must be treated in accordance with the principles of the comity of nations.

Musgrave *v.* **Pulido.** 43 *Vict.*, 1880.

L. R. 5 *App. Cas.* 102.

History

This was an appeal to the Privy Council from the Supreme Court at Jamaica. The plaintiff had there sued the defendant for a trespass, in seizing and detaining a schooner, of which the plaintiff was charterer.

The defendant pleaded that he was governor of the island, and entitled to the privileges of that office, and that the acts complained of were done by him as governor, and as acts of state. The Supreme Court overruled the pleas, ordered the defendant to answer further, and the defendant appealed.

It was contended for the appellant, that the plea was good as a plea of privilege, and that it also disclosed a good defence to the action.

Judgment.

Judgment was delivered by Sir *Montague Smith* affirming the decision of the court below.

Held:—(1) That a governor is not privileged from being sued in the courts of his colony; (2) that it is within the province of municipal courts to determine whether any act of power done by a governor is within the limits of his authority, and therefore an act of state.

Tandy *v.* **Earl of Westmoreland.** 32 *Geo. III.*, 1792.

27 *S. T.* 1246.

This was an action brought against the Lord Lieutenant of Ireland, for what was alleged to be an act of state. The Attorney-General, before an appearance had been entered, moved the court to quash the proceedings. During the argument the Attorney-General offered, on the defendant's behalf, to enter an appearance if the plaintiff's counsel would declare that the action was not brought for an act of state. History.

The Court *held:* — That no action can be brought against the Lord Lieutenant for an act of state. Judgment.

The Chief Baron also *held:* —That the Lord Lieutenant, as the executive authority, cannot be sued at all.

Note.—Lord *Brougham* in *Hill* v. *Bigge* (3 Moo. P. C. C. at p. 480), refers to this case as inaccurately reported; as to which see, however, *Luby* v. *Lord Wodehouse*, 17 Ir. C. L. R. 638, at p. 639. He speaks of the dicta as exaggerated; but considering the view held by the judges in that case of the authority of a viceroy, there seems no sufficient reason for doubting that they were used.

On the question whether the Lord Lieutenant can be sued at all in his own courts, compare *Luby* v. *Lord Wodehouse* (next page), and the Note (p. 84, *post*).

Luby *v.* **Lord Wodehouse.** 28 *Vict.*, 1865.

17 *Ir. C. L. R.* 618–640.

History. Luby was the proprietor of the *Irish People* newspaper, and had been himself arrested, and his office had been broken into, and his working plant, books, and papers had been carried away and detained by the police. He brought an action against the Lord Lieutenant in the Common Pleas in trespass, trover, and detinue. The Lord Lieutenant did not appear and defend the action, but the Attorney-General applied for an order to stay all proceedings.

Judgment. *Held*:—That no action is maintainable against the Lord Lieutenant of Ireland in an Irish Court during his continuance in office for any act of state.

Where such an action has been brought, the court will on motion direct the writ of summons and plaint to be taken off the file without putting the Lord Lieutenant to his plea.

That the question as to whether or not the act was done by the defendant in his capacity of Lord Lieutenant is not a proper one to be submitted to a jury.

Note.—In 1 Smith's L. C., 8th ed. 1879, at p. 705, it is said that "the editors are informed that this case has been recently acted upon by the English law-officers."

Sullivan *v.* **Earl Spencer.** 35 *Vict.*, 1872.

I. R. 6 *C. L.* 173.

History. The Lord Lieutenant of Ireland, the defendant in this case, had suppressed a political meeting which was to have been held in the Phœnix Park, and the plaintiff brought an action for injuries alleged to have been committed by the police while preventing the holding of the meeting. A motion to stay all proceedings, and strike the defendant's name out of the summons and plaint, was heard by *Whiteside*, C. J., *O'Brien* and *Fitzgerald*, JJ., and granted.

Judgment. *Held:*—That *Luby* v. *Wodehouse* had been rightly decided both in principle and on authority; and that the act was one done in the Lord Lieutenant's politic capacity. That case was therefore followed, and motion made to stay all proceedings.

Note.—In connection with this and the preceding cases, see *O'Byrne* v. *Marquis of Hartington and Others*, 1877; Ir. R. 11 C. L. 445, which arose out of the same facts as this present case.

NOTE VI.—ON THE LIABILITY OF GOVERNORS.

It is now well settled that a colonial governor may be sued not only in this country but in the courts of his colony during his governorship. Some degree of doubt as to his liability was caused by an erroneous theory expressed by Lord *Mansfield* in *Fabrigas* v. *Mostyn*, "that the governor is in the nature of a viceroy, and that therefore locally, during his government, no civil or criminal actions will lie against him." This doubt was disposed of, however, by the cases of *Hill* v. *Bigge*, and *Cameron* v. *Kyte*, and it is now well established that a governor's authority is expressly limited to the terms of his commission, and that he does not possess general sovereign power. There is one important qualification of his liability. He cannot be held responsible in any action for any act done by him as an act of state and within his legal authority. And *Musgrave* v. *Palido* shows that it is within the province of the courts to determine whether acts alleged to be acts of state are really so.

The Lord-Lieutenant of Ireland and probably the Governor-General of India, neither of which countries is a colony, stand indeed upon a different footing, and are considered to be viceroys. It has been held that no proceedings in respect of an act of state can be even commenced against the Lord-Lieutenant of Ireland, as is shown by *Tandy* v. *Earl of Westmoreland*, *Luby* v. *Wodehouse*, and *Sullivan* v. *Earl Spencer*. It was indeed admitted in *Luby* v. *Lord Wodehouse* (at p. 627), that actions had been brought against a Lord-Lieutenant for debt in the High Courts, and that he would be liable for every personal injury or debt. On the other hand it has been held in a Canadian case, in *Harvey* v. *Lord Aylmer*, that an action of debt did not lie against the Governor-General.[1]

A governor, like other public officers, is not personally liable on contracts made by him in his official capacity; and in all cases where his actions are of a judicial nature, he shares of course in the immunity of all judges.

The *criminal* liability of a governor is expressly provided for

[1] Cited in *Hill* v. *Bigge*, at p. 469.

by stat. 11 & 12 Will. 3, c. 12, which enacts that all crimes committed by 'governors of plantations . . . in the plantations,' shall be tried in the Court of Queen's Bench, or by special commission. In *R.* v. *Eyre*,[1] it was decided that under this statute, in the case of a misdemeanor alleged to have been committed by an ex-governor in his colony, a magistrate within whose jurisdiction the accused had come has jurisdiction to hear the case; and if he commits on the charge, must return the depositions into the Queen's Bench.

Ex-Governor Wall[2] was tried in 1802 for murder, on the ground of his having inflicted excessive corporal punishment in the island of Goree in 1782. He was convicted and hanged, Lord Campbell thinks, 'through vengeful enthusiasm.'[3]

In 1804 General Picton[4] was tried for a misdemeanor in causing torture to be inflicted upon Luisa Calderon to compel a confession while he was governor. A question arose as to whether the Spanish law permitted torture in Trinidad at the time of its cession by Spain. Upon a second trial the jury returned a special verdict, and the court ordered the defendant's recognizances to be respited till further orders. No judgment had been pronounced when General Picton fell at Waterloo.

For an early discussion of the various questions as to a governor's liability, *Dutton*, app. v. *Howell*, resp. 1690, in the House of Lords may be consulted.[5]

[1] L. R. 3 Q. B. 487.
[2] *R.* v. *Wall*, 28 S. T. 51.
[3] Campb., 3 Lives of the Chief Justices, 149; Forsyth, *loc. cit.* 86.
[4] *R.* v. *Picton*, 30 S. T. 225.
[5] Shower, Cases in Parliament, 24. Other cases on the power, duties, and liabilities of governors will be found collected by Mr. Forsyth, in 'Cases and Opinions on Constitutional Law,' pp. 80–89.

Grant *v.* **Sir Charles Gould.** 32 *Geo. III.*, 1792.

2 *H. Bl.* 69.

History. This case arose as an action for a prohibition to prevent the execution of a sentence passed on the plaintiff by a general court-martial. The plaintiff was charged with persuading two soldiers to desert in order to join the East India Company's service. He denied that he was a soldier, or liable to martial (meaning *military*) law, though he admitted, that for purposes of a recruiting agent he assumed the character of a serjeant, and received pay and allowances as such; or that he had been guilty of a military offence. The plaintiff having been convicted and sentenced, applied to the King's Bench for a prohibition.

Judgment. Judgment was delivered by Lord *Loughborough*, C. J., who pointed out, that "martial law does not exist in England at all." When martial law is established, it is very different from what is inaccurately called martial law merely because it is the decision by a court-martial. The Mutiny Act has created a court to try those who are a part of the army for breaches of military duty. The only ground of prohibition by the ordinary courts, is to prevent them from exceeding their jurisdiction.

The motion was therefore refused.

Sutton *v.* Johnstone. 24 *Geo. III.*, 1784.

1 *T. R.* 493; *Br.* 650–712.

History. In this case one navy captain brought an action against another for having, as his superior officer, put him under arrest and imprisonment, and so kept him nearly three years, until he was tried by court-martial for disobedience of orders. He was acquitted; and afterwards juries twice gave verdicts for the plaintiff with substantial damages.

Judgment. On motion made in arrest of judgment in the Exchequer, the question was decided in favour of the defendant.

Held:—That this is not like an action of trespass, which supposes that something manifestly illegal has been done. Here it is for the ordering of a prosecution which upon the stating of it is manifestly legal.

It seems that a commander ought not to be liable to an action for exercising his discretion in ordering his subordinate to be tried by court-martial; although there is no authority either way. And in this case even if the action were maintainable in itself, judgment ought, we think, to be given for the defendant.

Note.—Point decided according to Lord *Mansfield*, C. J.,[1] that there was probable cause for the imprisonment in that case; and the reversal of judgment of Exchequer must be taken to have proceeded on that ground.

Lush, J., thinks, in *Dawkins* v. *Paulet*,[2] that this is a judgment of high authority; that every year since Acts have passed for government of army and navy without any intimation of a contrary view on the part of the legislature; the judgment stands unassailed, one which has received the tacit assent of the legislature and the profession; and *Cockburn*, L. C. J., speaks of it with equal respect in the same case, while he would apply it differently to the case then before him.

[1] In *Warden* v. *Bailey*, 4 Taunt. 89. [2] L. R. 5 Q. B. at p. 122.

Col. Dawkins *v.* **Lord Rokeby.** 30 *Vict.*, 1866.

4 *F. & F.* 806; *L. R.* 8 *Q. B.* 255; 7 *H. L.* 744. *Cp.* *Dawkins* v. *Lord Paulet*, *L. R.* 5 *Q. B.* 94.

History. There were *two* actions in this matter by a military officer against his commander.

The first was an action for false imprisonment and malicious prosecution and conspiring with others to cause his removal from the army—tried in 1866.

Judgment. *Willes*, J., non-suited the plaintiff on the ground that no cause of action in a civil court had been shown. The matter had been discussed and disposed of by the military authorities. Persons who enter into the military state become subject to military rule and discipline, and must abide by them.

Q. B. The *second* was an action for libel on the ground of Lord Rokeby's evidence before the court of enquiry held into Col. Dawkins' conduct, and was tried before *Blackburn*, J., who directed the jury that the action did not lie, on the ground that the statements complained of were made by a military officer in the course of an enquiry into military matters.

Judgment.

Upon a writ of error this direction was approved by a court of ten judges—judgment being delivered by *Kelly*, L. C. B.

S. C. Judgment. A court of enquiry is a court duly and legally constituted, and recognised in the Articles of War and in many Acts of Parliament. And the principle is clear that no action of libel or slander lies against judges, counsel, witnesses, or parties for words spoken in the ordinary course of any proceeding before any court recognised by law.

H. L. Upon appeal to the House of Lords (5 May, 1874) the opinion of the judges was taken, and *affirmed*.

Note.—In 1869 Col. Dawkins brought an action against Lord Paulet[1] for a report made in the course of his duty to the Adjutant-General, declaring the plaintiff to be unfit for command, &c. The plaintiff by replication alleged actual malice and *mala fides*. *Mellor* and *Lush*, JJ., held the replication bad; no action will lie against a military officer for an act done in the ordinary course of his duty, even if done maliciously or without reasonable cause. *Cockburn*, L. C. J., dissented, and held the replication good: *Sutton* v. *Johnstone* had proceeded on the ground that there was reasonable and probable cause of arrest; and in that case Lord *Mansfield* expressly said, 'there is no authority either way.' *Dawkins* v. *Rokeby* (this being of course only the earlier action of 1866) was the other way, but was a single nisi prius judgment.

Then in the *second* action against Lord Rokeby in 1873, the Court of Exchequer Chamber, after referring to the L. C. J.'s opinion, observes that 'it is satisfactory to us to feel that the general question of privilege as applied to communications between military authorities upon military subjects . . . . is yet open to final consideration before a court of the last resort.'

When the question did eventually come before the House of Lords it was settled against the view taken by *Cockburn*, L. C. J.

In *Thomas* v. *Churton*,[2] seven years before, the Lord Chief Justice had applied the same principle to the case of judges. There he says, 'I am reluctant to decide, and will not do so until the question comes before me, that if a judge abuses his judicial office by using slanderous words maliciously and without reasonable and probable cause, he is not to be liable to an action.' The law upon the question is now, however, settled beyond the reach of any but legislative interference.

[1] L. R. 5 Q. B. 94.

[2] 2 B. & S. 475 (1862).

Madrazo *v.* **Willes.** 1 *Geo. IV.*, 1820.

3 *B. & A.* 353.

This was an action brought against the captain of a British man-of-war by a Spanish subject for the wrongful seizure on the high seas of a ship employed by him in carrying on the African slave-trade, together with her cargo of 300 slaves. The plaintiff was not forbidden to carry on this trade by the laws of his own country.

At the direction of *Abbott*, L. C. J. [Lord *Tenterden*], the jury assessed the damages for ship and slaves separately, as the judge at first thought that damages could not be recovered in an English court for loss in the prosecution of a trade here declared unlawful.

Upon the argument of a rule to reduce the damages accordingly, the court, *Abbott*, L. C. J., *Bayley*, *Holroyd*, and *Best*, JJ., decided in favour of the plaintiff.

Held:—That the plaintiff was entitled to recover damages for seizure of the slaves, of which he was legally possessed by the laws of his own country.

Buron *v.* **Denman.** 11 *Vict.*, 1848.

2 *Ex.* 167.

In this case the plaintiff, who was a Spaniard, and not a subject of the Queen, was lawfully possessed of slaves on the west coast of Africa. The defendant was captain of a man-of-war, who had proceeded to the Gallinas to release two British subjects there detained as slaves. He then concluded a treaty with the native king for the abolition of the slave-trade in his country, and in execution of the treaty fired the plaintiff's premises and carried away and released his slaves.

The defendant's proceedings were afterwards approved by his government.

The case was tried at Bar before *Parke*, *Alderson*, *Rolfe*, and *Platt*, BB.

Held:—That the ratification of the defendant's act by his government made it an act of state for which no action could be maintained.

NOTE VII.—ON THE LIABILITY OF OFFICERS —MILITARY AND NAVAL.

Some degree of protection to the persons responsible for the performance of duties imposed upon them by the executive is necessary, to induce them to undertake the performance of those duties, and to secure their regular and uninterrupted working.

This protection must be twofold—first, against their own subordinates, and secondly against the general public.

1. No officer is responsible to strangers for any injury done to them in the regular discharge of his proper duties, or arising out of his pursuing the instructions of his proper superiors, or where his superiors have ratified his acts. This is illustrated by *Buron* v. *Denman* (*supra* p. 91). In *Nicholson* v. *Mouncey*,[1] a sloop of war had run down the plaintiff's vessel, while it was under the defendant's command, although at the time of the collision the ship was under the navigation of the lieutenant. The captain was held not liable, since he is not in the ordinary position of the master of a vessel, and the lieutenant was in no sense his agent. *Hodgkinson* v. *Fernie*[2] was a curious case, in which it was laid down that this immunity from action would extend to a private shipmaster acting under the commands of a naval officer.

But the officer's immunity will not extend so as to cover any tortious act which does not take place in pursuance of the proper discharge of the officer's general or special duty. This is shown in *Madrazo* v. *Willes*.[3] So it was suggested in *Tobin* v. *The Queen*, reported above, that an action might lie against Captain Douglas, who had also destroyed a supposed slaver.

2. Prompt obedience is essential to the discipline and efficiency of the services; and superior officers must often decide hastily. They must be guarded against excessive responsibility to their inferiors. It is settled, therefore, that an officer cannot be held liable in a civil court for any act done in the discharge of his duty, even though it be alleged to be

[1] 15 East, 384. [2] 2 C. B. N. S. 415. [3] 3 B. & Ald. 353.

done maliciously and without reasonable cause. For this *Sutton* v. *Johnstone* is the great authority. Though it did not decide expressly that no action would lie for a malicious prosecution without reasonable cause, Lord *Mansfield* and Lord *Loughborough* expressed a strong opinion to that effect; and their view has been confirmed in the later cases of *Dawkins* v. *Lord Rokeby* and *Dawkins* v. *Lord Paulet*.

It is to be observed that the services are governed by articles and regulations of their own, and the Courts will, as a general rule, refuse to enquire into purely military or naval matters. This has been definitely established in the course of the recent important case of *Dawkins* v. *Lord Rokeby*, by a decision of the House of Lords. The Articles of War prescribe rules for the 'Redress of Wrongs,' and officers must be considered to be bound by those rules.

In *Barwis* v. *Keppel*,[1] the Courts refused to entertain an action in the case of a sergeant who had been maliciously reduced to the ranks by the defendant, an officer in the Guards. The act had been done in Germany during war time, and the Court held that it had no jurisdiction—the king acting there by virtue of his prerogative.

[1] 2 Wils. 314.

Prohibitions del Roy (Case of Prohibitions).

3 *Ja. I.*, 1607.

12 *Rep.* 63.

History. The king was informed, upon complaint made to him by Archbishop Bancroft concerning prohibitions, that he had a right to take what causes he pleased from the determination of the judges and to determine them himself.

Answer. To which *Coke*, C. J., answered, in the presence and with the consent of all the judges of England:

That the king in his own person cannot adjudge any case, either criminal or betwixt party and party, and judgments are always given by the court:

The king may sit in the King's Bench, but the judgments are always given *per curiam;* no king after the Conquest assumed to himself to give any judgment:

The king cannot arrest any man, for the party cannot have remedy against the king.

Note.—Coke's statement that no king after the Conquest gave judgment is probably not correct, and we must remember that the 12th Part of his Reports was not published by himself. It it said in the well-known *Dialogus de Scaccario*,[1] that the king presides in person in the King's Bench, and Madox (ii., 10) mentions several cases in which Henry III. 'sat and acted in person at the Exchequer.' What James wanted was to assert a right on the part of the crown to decide questions in which two courts were brought into collision, and thus to decide that the King's Bench could not prohibit the Ecclesiastical Courts.[2]

[1] I. iv.; Stubbs, Sel. Ch. 168.
[2] See Gardiner, 2 H. E. 35, 122.

Floyd *v.* **Barker.** 5 *Ja. I.*, 1607.

12 *Rep.* 23 (vi. 223).

History. A grand jury of Anglesey had indicted one William Price for murder, and he had been convicted and executed. Floyd proceeded by 'bill' in the Star Chamber against Barker, the judge of assize on the trial, and the grand jurors.

The case was heard before *Popham*, L.C.J., *Coke*, C.J., the Chief Baron, the Lord Chancellor, and all the Court of Star Chamber, and it was—

Judgment. *Resolved:*—That when a grand inquest (*i.e.* grand jury) indicts one of murder or felony, conspiracy doth not lie against the indictors, even where the party is acquitted.

What a judge doth as judge of record ought not to be drawn into question in this court or before any other judge.

Note.—The reason of this is said *in loco* to be that the king himself is *de jure* to deliver justice to all his subjects, and because he cannot himself do it to all persons, he delegates his power to his judges. Any cause of complaint, therefore, ought to be laid before the king himself (at p. 25). Compare the *Earl of Macclesfield* v. *Starkey*, 1684;[1] an action of scandalum magnatum against one of a grand jury for a conspiracy to make a malicious and libellous presentment.

In *The King* v. *Skinner*, 1772;[2] a justice of the peace was indicted for scandalous words to a grand jury, which was supported on the ground that the grand jury had no remedy by action, but Lord *Mansfield*, L. C. J., quashed the indictment.

[1] 10 S. T. 1349.

[2] Lofft., 55.

Bushell's Case. *22 Car. II.*, 1670.

Vaughan, 135; 6 *S. T.* 999; 6 *Br.* 120–144.

History. A jury had acquitted William Penn and William Mead at the Old Bailey Sessions, on a charge of preaching in a London street, and had been fined by the Recorder forty marks each for contempt in doing so, and in default committed. A habeas corpus was moved, and the return was that the prisoners had been committed for finding 'contra plenam et manifestam evidentiam, et contra directionem curiæ in materia legis.'

Judgment. Per *Vaughan*, C. J.: The return is insufficient, for it gives the Court no opportunity of forming their own judgment as to the sufficiency of the evidence. Nor is the Court bound to accept the opinion of the sessions court, for judges' decisions are constantly reversed. Then (1) the jury may have evidence before them that the judge has not; (2) in any case they do not find the law, and therefore cannot return a verdict contra directionem curiæ in materia legis. Without a previous knowledge of the facts the judge cannot direct, and he only knows the facts from the determination of the jury. They should be said to have acquitted against the evidence, corruptly and knowing the evidence to be full and manifest.

Decided:—That finding against the evidence, or direction of the court, is no sufficient cause to fine a jury.

Hamond *v.* **Howell.** 26 *Car. II.*, 1675.

2 *Mod.* 218 (*cp.* 1 *Mod.* 184).

History. The plaintiff had been one of the jury on the trial of Penn and Mead,[1] and had been committed. He now brought an action of false imprisonment against the Recorder of London (the defendant), the Mayor and the whole court at the Old Bailey.

The case was argued before *Vaughan*, C.J., and the Court of Common Pleas. But the whole Court were of opinion 'that the bringing of this action was a greater offence than the fining of the plaintiff and committing him for non-payment; the court had jurisdiction of the cause... they thought it to be a misdemeanor in the jury to acquit the prisoners, which in truth was not so, and therefore it was an error in their judgments, for which no action will lie.'

Judgment. *Held*:—That an action will not lie against a judge for what he doth judicially though erroneously.

[1] Cp. *Bushell's case*, opposite.

Houlden *v.* Smith. 13 *Vict.*, 1850.

14 *Q. B.* 841.

History. This was an action of trespass for false imprisonment. The defendant, as county court judge, had ordered the plaintiff to be committed for contempt in not appearing before him upon a summons. The plaintiff did not reside in the county court district of which the defendant was judge, but in a neighbouring district, and this was known to the defendant, who supposed, nevertheless, that he had authority.

Judgment. *Held:*—That the commitment being in excess of jurisdiction, and made under a mistake in the law and not of the facts, the judge was liable in trespass.

Note.—In *Scott* v. *Stansfield*, 1868; L. R. 3 Exch. 220, the defendant was also a county court judge. The defendant in his capacity as judge, and while sitting in his court, had said of the plaintiff, an accountant, that he was "a harpy preying on the vitals of the poor." The plaintiff brought an action of slander, but upon demurrer it was—

Held:—That "no such action would lie, even where the words used by the judge were alleged to have been spoken maliciously and without probable cause, and to have been irrelevant to the matter before him." (*Per Kelly*, C. B., at p. 222.)

Kemp *v.* Neville. 24 *Vict.*, 1861.

10 *C. B. N. S.* 523; *Br.* 734.

History. The plaintiff, a milliner, had been arrested in the company of several undergraduates at Cambridge, and had been committed to prison for fourteen days as a person of bad character, by the defendant, the vice-chancellor of the University, in the course of his judicial duties. She recovered damages against him in an action for assault and false imprisonment. The defendant moved to enter the verdict for himself.

Argument. The plaintiff relied mainly on certain minor points arising out of the peculiar administration of the proctorial system at Cambridge, which rests upon a charter of Elizabeth, confirmed by statute 13 Eliz. c. 19. (1.) No witnesses were examined on oath at the hearing by the vice-chancellor, nor were certain persons sent for to whom she referred as to her character. (2.) There was no warrant in writing. (3.) The place of imprisonment (called the spinning-house) was unlawful, not being a common gaol.

Judgment. These were overruled on the ground (1, 2) that the charter prescribed no particular procedure; (3) that as to the place of confinement, the court was bound to suppose in favour of the existing user.

But the main contention of the defendant was that as he acted throughout to the best of his judgment in his judicial capacity as judge of a court of record, no action of trespass could lie for anything done by him as judge; and in that he was right.

Fray *v.* **Blackburn.** *26 Vict.*, 1863.

3 Best & Smith, 576.

History. The plaintiff had been plaintiff in a previous action heard before Sir *Colin Blackburn*, one of the judges of the Queen's Bench, and had obtained a rule nisi, which the defendant at the hearing refused to make absolute. She now brought an action against him, and claimed 50*l.* damages.

Demurrer. The defendant demurred 'that no action lies against a judge of a superior court for anything done by him in his judicial capacity; (2) that the declaration was bad for not alleging malice and want of reasonable and probable cause.'

Argument. The plaintiff argued her own case, and was refused leave to amend, because, though it be alleged that the act charged was done maliciously and corruptly, that will not make the declaration good.

Judgment. *Decided:*—That an action does not lie against a judge of one of the superior courts for a judicial act, though it be alleged to have been done maliciously and corruptly.

Calder *v.* **Halket.** 2 *Vict.*, 1839.

3 *Moo. P. C. C.* 28.

History. This was a case before the Privy Council, on appeal from the Supreme Court of Judicature at Fort William, in Bengal. The plaintiff had been apprehended, by order of the defendant—who was a magistrate having jurisdiction over Asiatics only, and the plaintiff was a European—for supposed participation in a riot. He brought an action for assault and false imprisonment, and upon a verdict being entered for the defendant, the plaintiff appealed. By statute (21 Geo. 3, c. 70, s. 24), the provincial magistrates in India have the same immunity from actions extended to them in respect of their judicial functions, as judges have in this country.

Argument. It was argued for the appellant that as the act in question was in excess of his jurisdiction, which extended only to natives, an action would lie.

Judgment. Judgment was given by *Parke*, B., and it was held that the plaintiff was bound to show that the judge knew, or ought to have known, the defect of jurisdiction, but of this there was no evidence, and the appeal must be dismissed.

Decided:—That a judge is not liable in trespass for a judicial act, without jurisdiction, unless he knew or ought to have known of the defect, and it lies on the plaintiff in every such case to prove that fact.

NOTE VIII.—ON THE LIABILITY OF JUDGES.

The law as to the civil and criminal irresponsibility of judges is well settled. No judge is liable to any proceedings before any ordinary tribunal for any judicial act or omission—with two singular exceptions, the refusal of a writ of habeas corpus in vacation, expressly provided for in the Act,[1] or the refusal of a bill of exceptions.[2] 'A series of decisions from the time of Coke (in *Floyd* v. *Barker*) to *Fray* v. *Blackburn*, established that no action will lie against a judge for acts done or words spoken in his judicial capacity in a court of justice.'[3] And judicial acts are not only those done in open court, but all those emanating from the legal duties of a judge, as for example, acts done in chambers.[4]

This doctrine has been applied not only to the superior courts, but to the court of a coroner, and to a court-martial, which are not courts of record. And it does not matter although malice and corruption be alleged, or want of reasonable and probable cause. Nor even if the judge exceeds his jurisdiction will he be liable to an action, unless the plaintiff can prove that he knew, or ought to have known, the defect of jurisdiction.

This rule has been established to secure the independence of the judges and to maintain their authority. For this purpose they must be free from the liability to harassing and vexatious actions at the suit of discontented parties.

The decisions cover the cases of the highest judge in the land, the Lord Chancellor, the Superior Courts, the court of the Vice-Chancellor of a University, an ecclesiastical judge, a coroner, and a county court judge; nay, it has even been extended by analogy to the case of an arbitrator or referee.[5]

Magistrates or justices of the peace are not protected to the same extent. Their case is specially provided for by 11 & 12 Vict. cc. 42—44 (Jervis's Acts), and an action will lie against them in either of two events:

[1] By 31 Car. 2, c. 2, s. 9.
[2] By Stat. Westm. 2, 13 Edw. 1, c. 31.
[3] *Per Kelly*, C. B., in *Scott* v. *Stansfield*, L. R. 3 Ex. 223.
[4] *Taafe* v. *Downes*, 3 Moo. P. C. C. 60.
[5] *Poppa* v. *Rose*, L. R. 7 C. P. 525 (Ex. Ch.)

1. For an act done without their jurisdiction.

2. For an act done within their jurisdiction, but maliciously and without probable cause.

What remedies then are provided in case of error or misconduct on the part of judges?

For errors in law a remedy exists in an elaborate system of appeals. For actual misconduct in the case of judges of the superior courts, the constitutional remedies are by impeachment, or by removal on the address of both Houses of Parliament. Since the Revolution there has been only one instance of such impeachment—the case of Lord Chancellor *Macclesfield* in 1725; though there have been several cases in which parliamentary proceedings have been taken, in one of which a judge has been removed from office.[1]

The judges of inferior courts, however, are subject to the control of the Queen's Bench, and are removable for misbehaviour at common law or by statute. The Lord Chancellor may remove a coroner or a county court judge for inability or misconduct.

A justice of the peace is subject to a criminal information for misbehaviour, and may be discharged from the commission at the pleasure of the crown.

[1] Until the Act of Settlement (12 & 13 Will. 3, c. 2) the judges were of course removable at the pleasure of the crown. By that Act it was enacted that their commissions should remain in force notwithstanding the demise of the crown, provided that the crown might remove them "upon the address of both Houses of Parliament." The first case in which such an address was proposed was that of Mr. Justice *Fox* (an Irish judge) in 1805. In 1828 Sir *Jonah Barrington* was, on an address, removed from the office of Admiralty judge in Ireland. Abortive and unfounded proceedings were taken in the House of Commons in the cases of Lord *Abinger* (1843) and Sir *Fitzroy Kelly* (1867). The control exercised by Parliament over the judicial system will be found fully treated in 2 Todd, Parl. Gov., 724–766 (c. vi.).

Astley *v.* **Younge.** 32 *Geo. III.*, 1759.

2 *Burr.* 807.

History. This was an action of slander. The defendant was a justice of the peace, and had refused to grant a licence for a public inn. An application was then made to the Court of King's Bench concerning the refusal, and on this application the plaintiff made an affidavit in reference thereto. The defendant answered this affidavit by another, in which he alleged the plaintiff's affidavit to have been 'falsely sworn.'

The plaintiff thereupon brought his action, and the defendant demurred. The demurrer was argued before Lord *Mansfield*, L. C. J., and the court, who 'unanimously and clearly'—

Judgment. *Held*:—That no action would lie against the defendant for words 'only spoken in his own defence, and by way of justification in law, and in a legal and judicial way.'

Note.—The immunity of the parties to legal proceedings may no doubt be put on the ground of privilege arising from interest, and this might be extended to advocates, who are only the mouthpieces of the parties. It would be more difficult to extend it so as to cover the case of witnesses, at all events, so far as the immunity has been caused in such a case as *Seaman* v. *Netherclift* (see p. 106, *post*). It seems more satisfactory to put the immunity in all these cases upon the ground that parties and witnesses alike, when once legal proceedings have been commenced, are engaged, as it were, in the discharge of a public function, the proper performance of which is by this means more effectually secured.

Munster *v.* **Lamb.** 46 *Vict.*, 1883.

L. R. 11 *Q. B. D.* 588.

History. This was an action by the plaintiff against a solicitor for words spoken of the plaintiff by the defendant while he was defending a client in a judicial tribunal. The defamatory suggestion made by the defendant was unsupported by any evidence in the case.

At the trial the plaintiff was nonsuited by *Williams*, J. The divisional court refused to grant a new trial, and the plaintiff appealed.

The Court of Appeal, *Brett*, M. R., and *Fry*, L. J.,

Judgment. *Held*:—That no action will lie against an advocate for words spoken in a judicial proceeding, though they are spoken maliciously and without excuse, and are wholly irrelevant.

Seaman *v.* **Netherclift.** 40 *Vict.*, 1876.

L. R. 2 *C. P. D.* 53 (*cp.* 1 *C. P. D.* 540).

History. This was an action of slander. The defendant, an expert in handwriting, had given evidence in a suit to establish a will in which he pronounced the signature to the will, of which the plaintiff was an attesting witness, to be a forgery. The genuineness of the signature was established, and the judge made some observations on the defendant's presumption. Afterwards, in another proceeding on a charge of forgery, he was asked, in cross-examination, as to the observations of the judge above mentioned. He answered the question, and added that he believed 'that will to be a rank forgery.' The plaintiff then brought the present action.

It was tried before *Coleridge*, C. J., and a verdict found for the plaintiff. On motion to enter judgment for the defendant, *Coleridge*, C. J., and *Brett*, J., decided in favour of the defendant.

The case went to the Court of Appeal (*Cockburn*, L. C. J., *Bramwell* and *Amphlett*, JJ.A.), which

Judgment. *Held*:—That words spoken by a witness in the course of and having reference to a judicial enquiry are absolutely privileged.

Note.—Perhaps the earliest instance of an action against a witness was *Damport* v. *Sympson*, 1597; when a disappointed plaintiff sued one of his opponent's witnesses for perjury, and recovered a verdict and damages. But it was held upon motion in arrest of judgment that 'action lay not.'

It may be noted how the principle of privilege in these cases has been gradually developed. In *Hodgson* v. *Scarlett*, 1818; 1 B. & A. 232, it was decided, following *Brook* v. *Montague*, 1606; Cro., James, 90, that an advocate's privilege only protects him so long as what he says is relevant; and *Coleridge*,

L. C. J., points out in *Seaman* v. *Netherclift*[1] that 'it has never yet been decided that they would not be subject to an action for words spoken even during the conduct of a case, if the words were irrelevant, *mala fide*, and spoken with express malice.'

Of course *Munster* v. *Lamb* has now decided this very point, and in the same way, though the present case only covers expressly words spoken by a witness relevant to the inquiry, it may perhaps be assumed, with the utmost respect for Lord *Bramwell's* dictum in *Seaman* v. *Netherclift*,[2] that the privilege of a witness would, if the case arose, be held to extend quite as far as that of an advocate.

It was held in *Goffin* v. *Donnelly*, 1881; L. R. 6 Q. B. D. 307, that the privilege extends to the case of a witness giving evidence before a Select Committee of the House of Commons.

It may be worth noticing that, although a witness is protected in respect of anything he says in giving evidence, he is liable to an action if he fails to attend upon the subpœna of the party summoning him.

[1] 1 C. P. D. at 545.
[2] 2 C. P. D. at p. 60.

Wason *v.* Walter. 32 *Vict.*, 1868.

L. R. 4 *Q. B.* 73.

History. This was an action of libel against one of the proprietors of the *Times* newspaper, for a report of a debate in the House of Lords, in which statements had been made reflecting on the plaintiff.

There was another count in respect of a leading article on the debate.

The action was tried before *Cockburn*, L. C. J., who directed the jury, that if the matter charged as a libel was an accurate report of the debate, the occasion was privileged, and that as to the second count a public writer is entitled to make fair and reasonable comments on matters of public interest.

The jury found for the defendant. A rule having been obtained for a new trial, was argued and the judgment of the court delivered by *Cockburn*, L. C. J.

Judgment. *Held:*—That a faithful report in a public newspaper of a debate in parliament is not actionable at the suit of a person whose character may have been called in question in the debate.

Curry *v.* **Walter.** 36 *Geo. III.*, 1796.

1 *Bos. & P.* 525.

History. This was an action for publishing a libel on the plaintiff in the *Times*. The libel purported to be an account of an application to the King's Bench for an information against the plaintiff and another, both justices of the peace, for refusing to license an inn. The ground of the application was, that there was a conspiracy between the justices and the innkeeper's landlord to find a pretence for refusing the licence.

Verdict. The case was tried by *Eyre*, C. J., and a jury, the C. J. directing them that though the matter contained in the paper might be very injurious to the character of the magistrates, yet, being a true account of what took place in a court of justice, which is open to all the world, the publication was not unlawful. The jury found a verdict for the defendant.

Judgment. A rule was obtained for a new trial, when the Court (*Eyre*, C. J., *Buller*, *Heath*, *Rooke*, JJ.)

Held:—That this action could not be maintained.[1]

[1] The case stood over on another point, and no judgment was ever given.

Usill *v.* **Hales.** 41 *Vict.*, 1878.

L. R. 3 *C. P. D.* 319.

History. This was an action against the publisher for an alleged libel published in the *Daily News*, consisting of a report of an application made by three persons to a police magistrate for a summons against the plaintiff. The application was *ex parte*, and the magistrate held that it was a matter of contract, and not a case for criminal process, and referred them to the county court.

The action was tried before *Cockburn*, L. C. J., who directed the jury that the publication, if a fair and impartial report, was privileged.

It was argued on a rule nisi for a new trial, and it was by *Coleridge*, L. C. J., and *Lopes*, J.,

Judgment. *Decided:*—That a fair and impartial report of a proceeding in a police court, even though it was an *ex parte* and preliminary proceeding, is privileged.

Note.—Compare the case of *Lewis* v. *Levy*, 1858; E. B. & E. 537, nearly to the same effect. There, however, the reporter had expressed an opinion, and this was held not to be privileged, and Lord *Campbell*, L.C.J., said, 'we are not prepared to lay down for law that the publication of preliminary inquiries before magistrates is universally lawful; but we are not prepared to lay down for law that the publication of such inquiries is universally unlawful.'

Davison *v.* Duncan. 20 *Vict.*, 1857.

7 E. & B. 229.

History. This was an action for a libel contained in the report of the proceedings at a meeting of Improvement Commissioners to which the public were admitted. The defendant demurred, alleging that it was a true account published without malice.

The demurrer was heard before *Campbell*, L. C. J., *Coleridge*, *Wightman*, and *Crompton*, JJ., and allowed.

Judgment. *Decided:*—That it has never yet been held that privilege extends to a report of what takes place at all public meetings.

Note.—In 1858 Lord *Campbell* brought in a bill to make reports of certain public meetings privileged, which was however thrown out. In the debate it was assumed by all the law lords that the principle is here correctly laid down. This case was also followed in *Purcell* v. *Sowler*, 1877 ; L. R. 2 C. P. D. 215 (C. A.). Now see the Newspaper Libel and Registration Act, 1881 (44 & 45 Vict. c. 60), which enacts that :—

(S. 2.) " Any report published in any newspaper of the proceedings of a public meeting shall be privileged, if such meeting was lawfully convened for a lawful purpose and open to the public, and if such report was fair and accurate and published without malice, and if the publication of the matter complained of was for the public benefit."

(S. 3.) " No criminal prosecution shall be commenced against any proprietor, publisher, editor, or any person responsible for the publication of a newspaper for any libel published therein, without the written fiat or allowance of the Director of Public Prosecutions in England or Her Majesty's Attorney-General in Ireland being first had and obtained."

APPENDIX.

Attorney-General *v.* **Bradlaugh.** 48 *Vict.*, 1884.

(*Not yet reported; See* TIMES, *June* 30, *Dec.* 8, 1884, *and Jan.* 29, 1885.)

THIS was an information by the Attorney-General to recover a penalty from the defendant for sitting and voting as a member of the House of Commons, on the 11th of February, 1884, without having taken the oath in the manner required by the Parliamentary Oaths Act 1866. In view of the importance of the point involved, the trial was at Bar before *Coleridge*, L.C.J., *Grove*, J., and *Huddleston*, B.

The *Lord Chief Justice*, in summing up the case to the jury, said that the two main questions for them were: 1st. Did the defendant take the oath within the meaning of the Act; 2nd. Was he a person capable in law of taking the oath in the sense of the Act? Some minor questions were also put to the jury.

The jury found, 1st, that the defendant when he took the oath on the 11th of February, 1884, had no belief in a Supreme Being; 2nd, that he did not take and subscribe the oath in the sense of the Act, or according to the course and practice of Parliament.

The Court thereupon directed the jury to find a verdict for the Crown.

A motion by Mr. Bradlaugh for a new trial, and in arrest of Judgment, was refused by a Divisional Court (Dec. 8th), formed of the same judges.

Mr. Bradlaugh appealed from this refusal, but the appeal was dismissed by the Court of Appeal, composed of the *Master of the Rolls*, *Cotton*, and *Lindley*, LL.JJ.

Held:—(1) That the oath had not been taken and subscribed publicly and solemnly in accordance with the Act and the Standing Orders. (2) That a person who has not a belief in a Supreme Being cannot take an oath.

Note.—This case is added not as a great constitutional case, but because the reader may expect to find it here. As will be seen, it turns chiefly on the construction to be placed on the Act of Parliament, which must be read in connection with the practice of Parliament and the Standing Orders.

The sections of the Act of 1866 are as follows:—

'3. The Oath hereby appointed shall in every Parliament be solemnly and publicly made and subscribed by every Member of the . . . . House of Commons at the Table in the Middle of the said House, and whilst a full House of Commons is there duly sitting, with their Speaker in his Chair, at such hours and according to such Regulations as each House may by its Standing Orders direct.

'4. Every Person of the Persuasion of the People called Quakers and every other Person for the time being by law permitted to make a solemn Affirmation or Declaration instead of taking and subscribing the Oath hereby appointed, may make and subscribe a solemn Affirmation,' &c., &c.

The Standing Order of 30 April, 1866, directs that 'Members may take the oath at any time before the orders of the day or notices of motion are entered upon, or after they are disposed of, but no debate or business is to be interrupted for that purpose.'

There was an incidental question whether the action to recover the penalty was a criminal proceeding (in which case there would have been no right of appeal), but the Court of Appeal held that it was not.

The question upon the 4th section of this Act whether Mr. Bradlaugh was entitled, as he had originally claimed, to make an affirmation was decided against him in 1881 in the case of *Clarke* v. *Bradlaugh* in the Court of Appeal (L. R., 7 Q. B. D. 38). For an account of the several stages of Mr. Bradlaugh's attempt to take his seat, see May, P. P., 9th ed., 210, 212–215.

GENERAL INDEX.

THE END.

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